

**Selected Guideline Application Decisions
for the Fourth Circuit
January 1994-September 2000**



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**Pamela G. Montgomery
Pamela O. Barron**

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL

CASE ANNOTATIONS — FOURTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

§1B1.1 Application Instructions

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The district court did not err in applying a cross-reference that resulted in a substantial increase in the defendants' sentences. The cross-reference in §2K2.1 required the application of the homicide guideline where death resulted from the firearms offense for which the defendants were sentenced; the defendants had previously been acquitted of the homicide in state court. The defendants argued that the increase was so large that it could not be imposed on the basis of conduct they had been acquitted of without a violation of their rights to due process. The court of appeals rejected this argument, reasoning that the §2K2.1(c)(1)(B) cross-reference does not create any presumption that the firearm offense of which the defendants were convicted involved death. Further, the court of appeals reasoned that the increase to which the defendants were exposed on account of the cross-reference, from 42 to 55 years of imprisonment and from 115 to 210 months of imprisonment, respectively, was not so profound that it is sufficient to implicate due process concerns or to give the impression of having been tailored to permit the application of the cross-reference to be a tail which wags the dog of the substantive offense. The cross-reference does not create a new offense or increase the statutory maximum to which the defendants were exposed, but merely limits the discretion of the district court in selecting an appropriate sentence within the statutorily defined range.

§1B1.2 Applicable Guidelines

United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 513 U.S. 978 (1994). The district court erroneously applied USSG §2D1.2 as a specific offense characteristic to increase the defendant's base offense level. The defendant was charged with conspiracy to possess with intent to distribute cocaine and marihuana, in violation of 21 U.S.C. §§ 841(a)(1), 846. The indictment also included a reference to the defendant's use of persons under the age of 18 in furtherance of the conspiracy, in violation of 21 U.S.C. § 861. However, he was never actually charged with this offense, and the jury was never asked to find whether this activity occurred. Nonetheless, the district court enhanced the defendant's base offense level because the indictment gave him notice that his conduct violated section 861. In effect, the district court treated §2D1.2 as a specific offense characteristic. The circuit court disapproved of this approach and concluded that it was inconsistent with the plain language of the guidelines. *But see United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993) ("Section 2D1.2 does not require a conviction under 21 U.S.C. § 860 in order to consider such drug activities as relevant conduct in calculating the defendant's base offense level." *Id.* at 587 n. 4). Section 1B1.2 instructs the sentencing judge to determine first the proper guideline and then any applicable specific offense characteristics under that guideline. Section 2D1.1, the guideline applicable in the instant case, has its own specific offense characteristics which do not include a cross-reference to section 2D1.2. Had the Commission wanted to include the use of persons under the age of 18 as a specific offense characteristic, it could have done so under section 2D1.1(b).

§1B1.3 Relevant Conduct

United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994). The district court did not err in applying a two-level enhancement for possession of a gun during a drug trafficking crime pursuant to USSG §2D1.1(b)(1) even though the gun belonged to one of several co-defendants and the government did not prove that the other co-defendants knew anything about it. The Fourth Circuit held that pursuant to USSG §1B1.3, it is appropriate to apply the enhancement to codefendants when it is reasonably foreseeable to them that a co-participant was in possession of a weapon. Quoting the First Circuit, the Fourth Circuit held that "[a]bsent evidence of exceptional circumstances, . . . it [is] fairly inferable that a codefendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that their collaborative criminal venture includes an exchange of controlled substances for a large amount of cash." *See United States v. Bianco*, 922 F.2d 910, 912 (1st Cir. 1991).

United States v. Moore, 29 F.3d 175 (4th Cir. 1994). The district court erred in applying the abuse of a position of trust enhancement to the defendants based on the acts of their co-conspirator. The circuit court rejected the government's argument that the Pinkerton principle that is embodied in relevant conduct applies to the role in the offense adjustments. The abuse of trust enhancement must be based on an individualized determination of each defendant's culpability. Application of Pinkerton and USSG §1B1.3 would undermine the purpose of the role in the offense adjustments which seek to distinguish among different levels of culpability.

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Defendant Patterson pleaded guilty to distributing morphine and Demerol which resulted in the death of a female minor. Defendant Laythe pleaded guilty to aiding and abetting that offense. The defendants argued that the death was not reasonably foreseeable to them, and that in sentencing, the appellate court should "draw an analogy to recent drug conspiracy cases in which defendants, whose convictions are based upon the total quantity of drugs in the conspiracy, are sentenced according to the quantity of drugs reasonably foreseeable to each defendant." The appellate court declined to draw such an analogy, and noted that under the sentencing guidelines, the district court must consider relevant conduct in determining the appropriate offense level. As part of relevant conduct under USSG §1B1.1 (a)(1)(A), the court must consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." The acts of distributing and aiding and abetting the distribution of the drugs are "wholly encompassed within the express language of subsection (A), which does not require a finding of reasonable foreseeability." The convictions and sentences were affirmed.

United States v. Rhynes, 206 F.3d 349 (4th Cir. 1999). Defendants were found guilty of conspiracy to traffic in controlled substances and sentenced to terms ranging from 292 months to life imprisonment after having received managerial enhancements for their roles in the offense. Defendants argued that the district court should have deferred to the jury's \$1,000,000 forfeiture verdict in calculating the quantity of illegal drugs foreseeable to them for sentencing purposes. The appellate court disagreed and reiterated that a district court has a separate obligation to make independent factual findings regarding relevant conduct for sentencing purposes. *See United States v. Love*, 134 F.3d 595, 605 (4th Cir. 1998), USSG §1B1.3. Forfeitures may not act as artificial limitations on the district court's sentencing discretion.

United States v. Walker, 29 F.3d 908 (4th Cir. 1994). The district court did not err in its disposition of two sentencing issues related to Federal Rule of Criminal Procedure 32(c)(3)(D), and USSG §1B1.3. First, the defendant argued that the district court erred in its application of Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to address his objection to the presentencing report recommendation that he be denied an adjustment for acceptance of responsibility. Second, the defendant argued that the district court erred by finding that the amount of loss caused by the defendant's fraudulent conduct exceeded \$200,000 and by increasing his offense level under USSG §2F1.1(b)(1)(I). The Fourth Circuit held that both of the defendant's claims lacked merit. On the first issue, the Fourth Circuit held that given the defendant's "specific objections" to the factual findings underlying the presentencing report recommendation that he be denied an adjustment for acceptance of responsibility, it is apparent that the district court satisfied its judicial obligation by making an adequate finding as to the defendant's allegations. *See United States v. Morgan*, 942 F.2d 243, 245 (4th Cir. 1991). On the second issue, the Fourth Circuit held that "the defendant's undervaluing of his personal property itself — wholly independent from the government's calculation of the amount of loss — conclusively established that the amount of loss exceeded \$200,000." *See* USSG §1B1.3(a)(3).

§1B1.8 Use of Certain Information

United States v. Lopez, 219 F.3d 343 (4th Cir. 2000). Defendant was convicted of distribution of marijuana and conspiracy to possess with intent to distribute marijuana. At sentencing, the government offered the testimony of a special agent regarding the substance of the defendant's proffer statement. The district court used the proffer statement as a secondary basis for making its finding as to drug amount. The district court found that the defendant had distributed more than 1000 kilograms of marijuana and sentenced him to 188 months imprisonment. Defendant appealed the district court's use of the proffer statement in sentencing given that the agreement expressly provided that any self-incriminating information would not be used in determining the applicable sentencing guideline range. The appellate court agreed with the defendant and vacated his sentence.

United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998). The district court erred in relying on the defendant's statements to his probation officer regarding the amount of cocaine distributed to deny him a reduction for minimal or minor participant. The statements were protected under the defendant's plea agreement from use in determining the defendant's applicable guideline range.

§1B1.10 Retroactivity of Amended Guideline Ranges

United States v. Capers, 61 F.3d 1100 (4th Cir. 1995), *cert. denied*, 517 U.S. 1211 (1996). The defendant was not eligible for retroactive application of an amendment to the commentary to USSG §3B1.1, enacted several months after his sentence was imposed, which would have prevented the application of the enhancement. The circuit court ruled that the defendant was not entitled to retroactive application of the guideline because the amendment created a substantive change in the circuit's operation of USSG §3B1.1. In making this determination, the circuit court noted that USSG §1B1.10 allows for consideration of a reduced sentence only if the amendment is listed in that guideline. The 1993 amendment to USSG §3B1.1 was not listed in USSG §1B1.10. The circuit court recognized, however, that the courts may give retroactive application to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in USSG §1B1.10. However, the circuit court determined the amendment to be substantive rather than clarifying, because it changed the law in

the circuit. Prior to the amendment, the Fourth Circuit had concluded that a defendant could receive the aggravated role enhancement without having exercised control over persons; the amendment, however, provides that the defendant must have exercised control over other persons to warrant the enhancement. The circuit court noted that its decision is in accord with other circuit courts holding that an amendment would be classified as substantive, and not clarifying when it cannot be reconciled with circuit precedent. *See United States v. Saucedo*, 950 F.2d 1508 (10th Cir. 1991), overruled on other grounds, *Stinson v. United States*, 113 S. Ct. 1913 (1993). The circuit court recognized and noted its disagreement with the Seventh Circuit's holding in *United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995), that the 1993 amendment to USSG §3B1.1 was a clarifying amendment. The Seventh Circuit applied the amendment retroactively even after acknowledging that the amendment "nullified" its interpretation of the guideline.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A6.1 Threatening or Harassing Communications

United States v. Brock, 211 F.3d 88 (4th Cir. 2000). The district court erred in applying a two-level enhancement based on finding that the defendant had made more than two threats. *See* USSG §2A1.6(b)(2). The defendant pleaded guilty to one count of violating 47 U.S.C. § 223(a)(1)(E) by making repeated interstate telephone calls for the purpose of harassing his former girlfriend. By the terms of the plea agreement, the defendant admitted only to using "threatening words," but denied that he "actually intend[ed] to threaten" his former girlfriend. The parties agreed that the applicable guideline was USSG §2A1.6(a)(2), which set the base offense level at six. The plea agreement additionally provided that the defendant, pursuant to USSG §2A1.6(b)(3), was subject to a two-level sentencing enhancement for violating a court protection order, but recommended a two-level reduction for acceptance of responsibility. *See* USSG §3E1.1(a). The presentence report, however, suggested that the defendant also was eligible for a two-level enhancement pursuant to §USSG 2A1.6(b)(2) for making "more than two threats." At sentencing, the defendant objected to the two-level enhancement for making more than two threats. The district court overruled the objection. As a result, the defendant's adjusted offense level at sentencing was eight. On appeal, the appellate court first noted the modifying language of USSG §2A1.6(a)(2) such that, for the guideline to apply, the offense "did not involve a threat to injure a person or property." Otherwise, USSG §2A1.6(a)(1) would apply, with a corresponding base offense level of 12. As a result, "relevant conduct should be considered in determining" which subdivision applies given the modifying language of USSG §2A1.6(a)(2). Consequently, if USSG §2A1.6(a)(2) applies, then the offense, even considering relevant conduct, did not involve threats to injure a person, as would be required for an enhancement under USSG §2A1.6(b)(2) to apply. Therefore, "because application of both provisions would require the district court to make contradictory factual findings," the enhancement for making more than two threats was improper.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999). Defendant was convicted of conspiring to transport stolen property and aiding and abetting. Defendant appealed the district court's determination of the value of stolen goods for sentencing purposes. The appellate court noted first that there is no statutory reason why the value of certain goods for jurisdiction purposes should be the same as the value for sentencing purposes. The definition of loss for jurisdiction purposes requires a determination of the value of the goods. Although the application notes to the Sentencing Guidelines also define loss as the value of the property taken, value in this context refers to a method for determining the loss to a victim. In other words, loss for guidelines purposes means that value which most closely represents the loss to the victim, and not the monetary value of the property involved. *See* USSG §2B1.1, comment. (n.2). As the district court calculated loss in terms of the monetary value of the property, and not in terms of the loss to the victim, resentencing was required.

§2B3.1 Robbery

United States v. Murray, 65 F.3d 1161 (4th Cir. 1995). The district court did not err in enhancing the defendant's sentence for making an "express threat of death" during a robbery when the defendant was unarmed. The circuit court ruled that "a threat to shoot a firearm at a person during a robbery, created by any combination of statements, gestures or actions that would put an ordinary victim in reasonable fear for his life, is an express threat of death under USSG §2B3.1, even though the person delivering the threat is not in possession of a firearm." The Fourth Circuit joined the interpretation of "express threat of death" adopted by the majority of the circuits that have addressed this issue. *See* United States v. France, 57 F.3d 865, 867 (9th Cir. 1995); United States v. Hunn, 24 F.3d 994, 997 (7th Cir. 1994); United States v. Robinson, 20 F.3d 270, 276-77 (7th Cir. 1994); United States v. Lambert, 995 F.2d 1006, 1008 (10th Cir.), *cert. denied*, 114 S. Ct. 333 (1993); United States v. Smith, 973 F.2d 1374 (8th Cir. 1992).

United States v. Souther, 2000 WL 992230 (4th Cir. July 18, 2000). Defendant pled guilty to two counts of bank robbery and was sentenced to 108 months' imprisonment after a three-level enhancement for brandishing, displaying or possessing a dangerous weapon. *See* USSG §2B3.1(b)(2)(E). Where the defendant kept his hands in his coat pockets during the robberies after having handed the teller a note indicating that he had a gun, and it appeared that defendant did have a dangerous weapon, the enhancement was proper even though the defendant did not in fact have a weapon and did not simulate the presence of a weapon with his hands beyond placing them in his pockets. *See* USSG §2B3.1(b)(2)(E), comment. (n.2).

United States v. Wilson, 198 F.3d 467 (4th Cir. 1999). The appellate court upheld the district court's application of §2B3.1(b)(4)(B) physical restraint enhancement during a carjacking. The victim agreed to give the defendants a ride to their house. After five minutes of travel, Wilson put a gun to the victim's head and told her to pull over. After pulling over, Wilson told the victim to get out of the car and hand over all the money she had. The victim complied, and the defendants drove off. The defendants were convicted of carjacking (18 U.S.C. § 2119) and a § 924(c) count. The district court applied a 2-level enhancement to Wilson's offense level for physical restraint of a person to facilitate commission of carjacking pursuant to §2B3.1(b)(4)(B), and the defendant appealed. The appellate court noted that §2B3.1(b)(4) provides for a 2 level enhancement "if any person was physically restrained to facilitate commission of the offense." Furthermore, a physical restraint enhancement is proper under §2B3.1 if the act of physical restraint adds to the basic crime. *See* United States v. Mikalajunas, 936 F.2d 153 (4th Cir. 1989). The appellate court concluded that the district court properly applied the physical restraint enhancement. A gun was placed to the

defendant's head, and she was prevented from leaving her car, albeit briefly, until the defendants could get her money and control of the car. Thus, the victim was physically restrained to facilitate the commission of the carjacking. In reaching its decision, the appellate court noted that physical restraint is not an element of carjacking, as carjacking does not necessarily involve physical restraint.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

United States v. Matzkin, 14 F.3d 1014 (4th Cir. 1994), *cert. denied*, 516 U.S. 863 (1995). The district court properly enhanced the defendant's sentence for influencing an official in a sensitive position pursuant to USSG §2C1.1(b)(2)(B). The defendant was convicted of bribery of a Navy employee who, as supervisory engineer, used his position to acquire and transfer information to the defendant relating to defense contract procurements. The defendant argued that since his Navy contact was only a GS-15 Navy engineer, he was merely a mid-level employee who lacked the power to award contracts on his own. The court of appeals disagreed, citing to the contact's position on the procurement review panel as evidence of his sensitive position. His position on this three person board provided him with the opportunity not only to obtain the information, but also to influence the Navy's final decision making, since it was unlikely that the Navy would grant a bid without the favorable opinion of the review board.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, Trafficking (including Possession with Intent to Commit These Offenses)

United States v. Christmas, 2000 WL 1059533 (4th Cir. May 5, 2000). Two-level enhancement for possession of a dangerous weapon, pursuant to USSG §2D1.1(b)(1), was proper and did not constitute double jeopardy even though the defendant previously had been convicted in state court for the same possession of the same firearm. Under the doctrine of dual sovereignty, federal prosecutions are not barred by a previous state prosecution for the same or similar conduct. *See Abbate v. United States*, 359 U.S. 187 (1959).

United States v. Fletcher, 74 F.3d 49 (4th Cir.), *cert. denied*, 519 U.S. 857 (1996). The defendant argued that the amendments to USSG §2D1.1 and its inclusion in USSG §1B1.10(c) for retroactive application required resentencing. The appellate court agreed and remanded the case for resentencing. The amended guideline provides that each marijuana plant is equivalent to 100 grams of dry marijuana, regardless of the number or sex of the plants involved. Under the amended provision, the defendant was responsible for the equivalent of 72.2 kilograms of dry marijuana (level 22, guideline range 41 to 51 months), rather than 722 kilograms (level 30, guideline range 97 to 121 months). The appellate court noted that despite the guidelines determination that the defendant's offense involved less than 100 kilograms of marijuana, "it appears that he nonetheless will remain subject to the mandatory minimum sentence of 60 months in prison due to his involvement with 100 marijuana plants or more. *See* 21 U.S.C. § 841(b)(1)(B)(vii)."

United States v. Harris, 39 F.3d 1262 (4th Cir. 1994). The district court sentenced defendant Boone to a mandatory minimum sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A), based

on its aggregation of quantities of different controlled substances involved in the conspiracy, to arrive at 52 grams of cocaine base. Subsequent to his sentencing, the appellate court decided United States v. Irvin, 2 F.3d 72, 73, 77 (4th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3552 (1994), which noted that although aggregation of drug quantities may be required sometimes under the sentencing guidelines, "section 841(b) provides no mechanism for aggregating quantities of different controlled substances to yield a total amount of narcotics." The sentence was vacated and remanded for resentencing in light of Irvin.

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The defendant was convicted of conspiracy to possess and distribute cocaine base. The district court did not commit clear error in converting all the cocaine powder found in his apartment into cocaine base for sentencing purposes, where credible evidence was presented to establish that the powder cocaine was manufactured into cocaine base for distribution.

See United States v. Kimberlin, 18 F.3d 1156 (4th Cir.), *cert. denied*, 513 U.S. 843 (1994), §1B1.3, p. 2.

United States v. Lipford, 203 F.3d 259 (4th Cir. 2000). The appellate court vacated the defendant's sentence after it reinstated the defendant's 18 U.S.C. § 924(c) conviction. The district court had increased the defendant's sentence by 2 levels after finding that the defendant possessed a firearm during the drug conspiracy. However, the district court ordered a judgment of acquittal on the defendant's § 924(c) conviction, and the government appealed. The appellate court reinstated the defendant's § 924(c)(1) conviction, which was based on carrying a firearm during and in relation to a drug transaction. The appellate court noted that under certain conditions, the guidelines prohibit an increase in base offense level for possession of a firearm if the same conduct served as the basis for a conviction under § 924(c)(1). The appellate court concluded that the record is sufficiently ambiguous that the district court could have relied upon the same conduct underlying the § 924(c) conviction when it increased the defendant's sentence 2 levels pursuant to §2D1.1(b)(1). Therefore, the defendant's sentence must be vacated, and the district court should determine if the defendant's sentence for a § 924(c)(1) conviction and whether an increase under §2D1.1(b)(1) is warranted in light of the § 924(c)(1) conviction.

United States v. Turner, 59 F.3d 481 (4th Cir. 1995). The district court erred in ruling that the 0.4 mg conversion factor in Amendment 488 did not apply to liquid LSD because liquid LSD is not on a carrier medium. The defendant was convicted of conspiracy to possess with intent to distribute in excess of one gram of LSD, distribution of LSD within 1000 feet of a school, and aiding and abetting in the possession with the intent to distribute marijuana within 1000 feet of a school. The defendant was sentenced to 108 months imprisonment, six years of supervised release, \$220 restitution and \$150 special assessment. Amendment 488 instructs courts not to use the weight of the carrier medium in calculating drug quantity for LSD offenses, to treat each dose of LSD on the carrier medium as equal to 0.4 mg. of LSD and contains an application note which defined liquid LSD as "LSD that has not been placed onto a carrier medium." The defendant argued on appeal that his base offense level should be determined by converting the dosage units of the liquid into LSD quantities using the 0.4 mg conversion factor. The circuit court ruled that ". . . Amendment 488 dictates that, in cases involving liquid LSD, the weight of the pure LSD alone should be used to calculate the defendant's base offense level." The court noted that the only reported decision was decided by the Middle District Court of Tennessee in United States v. Jordan, 842 F. Supp. 1031 (M.D. Tenn. 1994). The circuit court noted that the district court in Jordan had correctly recognized that plain language of the amendment

authorizes the use of "LSD alone" in cases involving liquid LSD. The circuit court further noted that the intent of the amendment was to "remove sentencing disparities based on the varied weight of LSD carrier media and to harmonize the sentences for LSD distribution with the sentences for offenses involving more dangerous controlled substances, such as PCP." The circuit court further noted that Amendment 488 does not contravene the Supreme Court's holding in Chapman v. United States, 500 U.S. 453 (1991), that the weight of LSD carrier media should be included in determining the appropriate sentence under 21 U.S.C. § 841(b)(1), because the Supreme Court did not address the proper determination of the weight of LSD when the transactions involve liquid LSD.

Crack — 100:1 Ratio

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The term "cocaine base" as used in §2D1.1 was not unconstitutionally vague and the 100:1 sentencing ratio of cocaine base to powder cocaine under 21 U.S.C. § 841(b) did not violate the equal protection clause. *See United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990); United States v. Bynum, 3 F.3d 769 (4th Cir. 1993); United States v. Pinto, 905 F.2d 47 (4th Cir. 1990). In addition, the 100:1 ratio did not constitute racial genocide in violation of 18 U.S.C. § 1901, as Congress did not establish it with the "specific intent" of "destroying" any racial or ethnic group.

§2D1.2 Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy

See United States v. Locklear, 24 F.3d 641 (4th Cir.), *cert. denied*, 115 S. Ct. 457 (1994), §1B1.2, p. 1.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit

United States v. Achiekwelu, 112 F.3d 747 (4th Cir.), *cert. denied*, 522 U.S. 901 (1997). The district court did not err in enhancing the defendant's sentence pursuant to USSG §2F1.1(b)(3)(A) on the ground that the defendant misrepresented that he was acting on behalf of a government agency. The defendant lured his victim to Nigeria, introduced him to several people claiming to be Nigerian government officials, took him to an office building that he claimed to be the Central Bank of Nigeria, prepared false government documents to arrange for the transfer of the victim's funds, and defrauded his victim of approximately \$4 million. Previous cases have only interpreted USSG §2F1.1(b)(3)(A) where the defendant misrepresented that he was acting on behalf of a domestic government agency, rather than a foreign government agency. The circuit court stated that the unambiguous language of a guideline must be followed unless there is a manifestation of contrary intent. In this case, the defendant misrepresented that he worked for the Nigerian Finance Ministry, which is a "government agency." The court stated that, standing alone, "government," as used in USSG §2F1.1(b)(3)(A), extends to both domestic and foreign government agencies. In reaching this conclusion, the circuit court stated that the guideline's language does not limit its applicability only to domestic government agencies and the guideline's commentary does not manifest a contrary intent to the guideline's plain language.

United States v. Adam, 70 F.3d 776 (4th Cir. 1995). The defendant, a medical doctor, was convicted under 42 U.S.C. § 1320a-7b(b) (1988) for receiving kickbacks from another doctor in a scheme to defraud Medicare. The appellate court applied the *de novo* standard of review in considering the loss calculation performed by the district court using guideline §2F1.1. Commentary 8 to that guideline states that "[t]he offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss." The defendant argued that the court should look to United States v. Chatterji, 46 F.3d 1336, 1340 (4th Cir. 1995), wherein the defendant's gain could not be used as a substitute for loss because no economic loss was established. The appellate court held that in the defendant's case, the amount of his gain "seems like a highly appropriate measure of the loss suffered by the American taxpayers . . . dollars that were needlessly drained from the Medicare system." The court found Chatterji distinguishable and affirmed the district court's loss calculation.

United States v. Brothers Construction Company of Ohio, Incorporated, 219 F.3d 300 (4th Cir. 2000). Defendant corporations were convicted of conspiracy to defraud the United States, two counts of wire fraud, and one count of making a false statement. Defendant Tri-State Asphalt Corporation received a \$500,000 fine; defendant Brothers Construction Company received no fine due to insolvency. Tri-State appealed, *inter alia*, the district court's loss calculation. Brothers Construction Company was a disadvantaged business enterprise (DBE) which, together with Tri-State (the general contractor), contracted with the government to work on a highway project. In fact, the government determined that Brothers did not perform any work on the project as required by the contract and state law. Tri-State, however, was permitted to use an alternative DBE to complete additional work on the project at no additional cost to the government. Tri-State argued that because the government received all the contract work it had bargained for, no loss resulted. The appellate court disagreed, holding that there was loss as contemplated by the. Although a DBE did perform the additional work, it was Tri-State and Brothers original intention to have d guidelines iverted the work to a non-DBE, which would have occurred by for a government audit having revealed that Brothers in fact had performed no work. As it was Tri-State's intention to have diverted the funds entirely from any DBE,

the amount of those funds properly could be considered for determining loss. *See* USSG §2F1.1, comment. (n.7). Next, Tri-State contended that because the president of Brothers was sentenced after a loss determination of only \$10,000, the same amount, and no more, should be attributed to Tri-State. The appellate court also rejected this argument by pointing out that the \$10,000 loss attributed to Brothers' president was the result of the district court's finding that a downward departure was warranted because the guideline amount overstated the seriousness of the president's offense. Merely because the sentences of the Brothers' president and Tri-State were disparate did not require a downward departure for Tri-State. *See United States v. Davis*, 98 F.3d 141, 145 (4th Cir. 1996). Finally, Tri-State contended, and the government conceded, that the loss amount relied upon by the district court overstated actual loss. The appellate court determined that Tri-State waived its right to appeal the loss amount inasmuch as it did not object to it at the sentencing hearing. In any event, even applying the lower loss amount and assuming the district court committed plain error, the fine did not effect Tri-State's substantial rights because the fine would lie only slightly above the middle of the fine range as calculated by Tri-State and there was no evidence before the court to suggest that the outcome would have been different if the Tri-State fine range had been utilized in the first instance.

United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995). The district court erred in determining the economic loss attributable to the defendant pursuant to USSG §2F1.1. The district court used the defendant's gross sales of some \$13.4 million as the economic "loss" caused by the defendant's regulatory fraud, resulting in an 11-level increase in his base offense level. The defendant, co-owner of a pharmaceutical company, submitted a drug application for FDA approval which was deficient, in that it purported to contain records for three batches of a drug when it was based on only one acceptable batch. In addition, after obtaining manufacturing and marketing approval from the FDA for a different drug, the defendant slightly modified the formula to increase its shelf life. There was no dispute that the safety and therapeutic value of the drugs was not affected by these deficiencies in meeting FDA requirements. The appellate court rejected the government's argument that loss under §2F1.1 should be measured by the defendant's gain from the sale of the drugs. Instead, the appellate court held that no quantifiable loss can be attributed to the defendant's conduct, because the drug possessed FDA approval, posed no threat to the health and well-being of the consumer, and met all of the goals of FDA requirements for safety and efficiency. The case was remanded for resentencing.

United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). The district court vacated the defendant's sentence and remanded for the district court to recalculate the loss amount. The defendant was convicted of two counts of making a false statement to obtain federal employee's compensation in violation of 18 U.S.C. § 1920. The district court found that the loss for sentencing purposes was the total amount of benefits paid to the defendant during the fraud. The appellate court noted under §2F1.1, "loss is the value of the money . . . unlawfully taken," and in a case involving diversion of government benefits, loss is the value of the benefits diverted from intended recipients or uses. The government argued that it lost the entire amount of benefits the defendant received during the period of time covered by the two relevant. The appellate court noted that its decision in United States v. Parson, 109 F.3d 1002 (4th Cir. 1997), foreclosed the government's argument. The appellate court in Parsons held that the loss was only the amount fraudulently claimed, not the total amount claimed in the vouchers. The court in Parsons added that even if automatic forfeiture of the entire voucher amount were required as a result of the false statement, this does not mean that the amount forfeited by a defendant constitutes a loss to the Government for loss purposes. Thus, the calculation of loss for sentencing purposes is different than the calculation of loss for sentencing purposes. In the case at bar, the appellate court vacated Dawkins' sentence, and advised the district court to consider loss as

the difference between the amount of benefits the defendant actually received and the amount he would have received had he truthfully and accurately completed the forms.

United States v. Dozie, 27 F.3d 95 (4th Cir. 1994). The circuit court rejected the government's argument that in determining loss under guideline §2F1.1, the district court should have used the face amount of the false insurance claims. The circuits are split on how "loss" should be determined. Despite the Fifth Circuit's concordance with the government, *see United States v. Lghodaro*, 967 F.2d 1028 (5th Cir. 1992), this circuit defines "probable loss" as loss that reflects "economic reality." Because insurance claims are frequently inflated, the face value of the claim does not always reflect economic reality and should therefore not always be utilized to calculate the amount of "loss." The sentence was affirmed. The decision rests, however, on application note 7's former reference to "probable or intended loss." The term "probable" was deleted effective November 1, 1991, by Amendment 393.

United States v. Henoud, 81 F.3d 484 (4th Cir. 1996). The circuit court affirmed the district court's determination of loss under USSG §2F1.1(b)(1) and found no abuse of discretion in its calculations of the restitution award. The defendant challenged the restitution order as to the victims named and the amount awarded, claiming that the order improperly required him to pay to certain companies not named in the indictment an amount in excess of that alleged in the indictment. Under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. §§ 3663, 3664, a district court may order a convicted criminal to pay restitution to "any victim" of his offense. Determination of the amount of restitution to be paid is typically calculated by the amount of loss sustained by the victim. Additionally, the award must be limited to the losses caused by the specific conduct of which the defendant was convicted; it cannot include unrelated losses. Hughey v. United States, 495 U.S. 411, 413, 110 S. Ct. 1979 (1990). The circuit court held that the district court was within its statutory authority with respect to the amount awarded and that it correctly adopted the broader definition of "victim" as "a party directly harmed by the defendant's criminal conduct in the course of a scheme or conspiracy" for purposes of restitution. In a scheme, the harm need only be a direct result of the defendant's criminal conduct, through or "closely related to" the scheme, conspiracy or pattern. The government proved that a scheme to defraud existed, in addition to proving specific incidents of fraud perpetuated on individual long distance companies. Therefore, the district court's inclusion of all losses to any victim caused by the scheme to defraud was not improper or in excess.

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). Defendant pleaded guilty to executing, aiding, and abetting a scheme and artifice to defraud a federal institution, and to filing a false income tax return. The government appealed the district court's imposition of a downward departure. The district court departed because it determined that the loss, \$3,364,958, overstated the seriousness of the offense in that the victim of the offense—a bank—delayed in confronting the defendant as to the offense conduct, and that the defendant was entitled to a reduction for substantial assistance even though the government declined to make the appropriate motion. Although in cases of nonviolent offenses, the provocation and harassment of the defendant by the victim may warrant a departure for victim misconduct, such was not the case here. *See* USSG §5K2.10. The bank did nothing to goad the defendant into launching the check-kiting scheme. Rather, the defendant's manipulative conduct, and not the bank's conduct, accounted for the enormous loss.

United States v. Loayza, 107 F.3d 257 (4th Cir. 1997). In a case of first impression, the district court correctly interpreted the guideline definition for "loss" and based the defendant's sentence upon the total value of funds taken from investors without subtracting for periodic payment of

"interest." The facts of this case were such that the defendant devised a Ponzi-type scheme and encouraged individuals to invest in his investment management company, the funds from which would then be invested in reputable mutual funds. Periodically, defendant used funds from new investors to make "interest payments" to earlier investors in an effort to avoid detection. The defendant argued for a calculation of loss which reflects a deduction of "interest" payments made to investors, in keeping with the definition of loss as "the value of the property taken, damaged or destroyed." USSG §2F1.1, note 7. The government argued for a calculation of loss equivalent to intended loss, because the guidelines provide that "if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." USSG §2F1.1. The circuit court rejected the defendant's net loss argument and aligned itself with the Second Circuit in adopting the intended "loss" calculation in similar cases. United States v. Mucciante, 21 F.3d 1228 (2d Cir. 1994). The court specifically noted that an approach which holds a defendant responsible for the entire amount of loss intended is appropriate if the payments facilitate the continued longevity of the scheme. In such cases, the defendant does not act out of a good faith change of heart or out of concern for returning something of value to his victims.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The defendant worked as one of two group leaders in Sales Audit Department at Woodward and Lothrop Department Stores. She held this position for ten years. The defendant used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately \$40,000. The district court enhanced the defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argues that the enhancement was unwarranted because her position does not fall within the definition of "public or private trust." The defendant relies on United States v. Helton, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position is functionally equivalent to an ordinary bank teller. The district court rejected defendant's argument and distinguished Helton. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in Helton did not require any special access. The appeals court affirmed the district courts conclusions and the 2-level enhancement.

United States v. Marcus, 82 F.3d 606 (4th Cir. 1996). The defendant appealed the district court's decision on remand, affirming its prior sentence. On remand, the district court considered its finding of loss in light of the Fourth Circuit's decision in United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), and reaffirmed the original sentence. The defendant, president and chief executive officer of a company that manufactured generic drugs, had pleaded guilty to one count of conspiracy to defraud the United States, 18 U.S.C. § 371, but reserved the right to contest the calculation of loss under the guidelines at USSG §2F1.1(b)(1). The government asserted that the measure of loss should be the defendant's gross sales, exceeding \$10 million, on the theory that the drug had no value because it did not meet FDA specifications. The district court agreed, and assessed the corresponding 15-level enhancement to the base offense level. The resulting guideline range was 41-51 months imprisonment. The defendant asserted that consumers suffered no loss because the drug possessed FDA approval, and the changes it made to the formula did not alter the safety of the drug. The appellate court disagreed, noting that unlike the case in Chatterji, the reason for the modification to the defendant's drug formula was a problem in passing dissolution tests, which bears on the therapeutic value of a time-released drug. The modification to the formula in Chatterji affected shelf life, but had no potential to affect the therapeutic value of the drug. In this case, the defendant conceded that "the modification would have been viewed by the FDA as significant enough to require additional

bioequivalence testing." This testing would have been unnecessary if there was no possibility that the change could affect the therapeutic value or safety of the drug. This was the pivotal distinction, and the district court decision was affirmed.

United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997). The district court erred in calculating the government's loss as including both fraudulent and legitimate travel voucher reimbursement requests submitted by the defendant. "Loss," as defined under §2F1.1, is the actual, probable, or intended loss to the victim and is limited to the tangible economic loss suffered by the victim. The circuit court found that loss was not equivalent to the total benefit received by the defendant because some benefit was rightfully due. In reaching this conclusion, the court rejected the government's argument as to the applicability of 28 U.S.C. § 2514, which authorizes a forfeiture proceeding in the event of a fraudulent claim submission. Firstly, this section is not self-executing and the submission of a false claim does not mandate forfeiture. Secondly, even if the provision were self-executing there is no precedent for treating the entire amount involved in the claims as equivalent to loss. The sentencing court should focus upon actual loss. Therefore, the loss in this case was limited only to the amount fraudulently claimed by the defendant.

United States v. Smith, 29 F.3d 914 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The defendant argued that the district court's determination of the amount of loss sustained in a bank loan fraud case was in error because a 1099A form, submitted by the bank to the IRS at a later date, showed no loss to the bank from the fraud. The circuit court rejected this argument because a 1099A form is generated to reflect the gross transaction amount, which establishes the capital gain or loss on a sale; it does not reflect any loss or gain to the bank at the time the fraud was perpetuated. Therefore, the district court's application of USSG §2F1.1, Note 7(b), which directs the court to consider actual loss, was correct despite the fact that the bank was able to recover this loss at a later date.

See United States v. Walker, 29 F.3d 908 (4th. Cir. 1994), §1B1.3, p. 3.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage by Use of Explosives

United States v. Davis, 202 F.3d 212 (4th Cir. 2000). The appellate court held that shooting a gun constituted a "use of explosives" under §2K1.4. The defendant was convicted of various offenses, including drug conspiracy, criminal property damage (18 U.S.C. § 1326), assault, and firearm convictions, including in connection with a failed drug transaction. The defendant and his partner fired 15 rounds of ammunition into the home of a man he suspected of stealing from them. Two guidelines sections are potentially applicable to an 18 U.S.C. § 1326 conviction: §2K1.4 (property damage by use of explosives) and §2B1.3 (property damage or destruction). In order for the court to apply section 2K1.4, it must conclude that "use of explosives" was involved in the "shooting" of the firearm when the defendant fired into the victim's house. The district court concluded that the shooting into the house qualified as a use of explosives, and applied §2K1.4 over the defendant's objection. The appellate court held that "property damage by use of explosives" under §2K1.4, includes the damage caused by projectiles discharged from a firearm. Although the guidelines do not define "explosive," the term is defined by 18 U.S.C. § 844(j) to include "gunpowders, . . . or [a] device that contains . . . any combustible units . . . that ignition by . . . detonation of the compound . . ., or device or any part thereof may cause an explosion." The appellate court concluded that gunpowder clearly is an "explosive," not only because it is specifically defined by statute, but also by its properties and use.

In an elementary sense, “shooting” requires an explosion to expel a projectile from a firearm. Therefore, the ammunition in a loaded handgun is thus an “explosive” under §2K1.4. The appellate court also examined other guidelines for which §2K1.4 is the guideline recommended by the Commission (§§2K2.4 and 2K1.7), and concluded that the “use of explosives” has the same meaning under all three guidelines. The appellate court stated: “[s]entencing based on property damage “by use of explosives” for these § 844 offenses demonstrates that ‘use’ of explosives under §2K1.4 is intended in the general sense rather than a precise, technical sense.” *Id.* at *6. Judge Michael dissented, stating: “[s]imply put, bullet hole damage is damage by use of a gun, not damage by use of explosives. It is too much of a stretch to say anything else.” *Id.* at *7.

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998). The defendant’s convictions on 14 firearms counts, based on 6 guns and ammunition, were unconstitutionally duplicative. The defendant was convicted of seven count under 18 U.S.C. § 922(g)(1) (prohibited possession of a firearm or ammunition by a convicted felon) and seven under § 922(g)(3) (prohibited possession of a firearm or ammunition by an illegal drug user). The court of appeals held that while a person must be a member of at least one of the nine classes prohibited from possessing guns under § 922(g), a person who is disqualified from possessing a firearm because of membership in multiple classes does not thereby commit separate and multiple offenses. The offense is determined by performance of the prohibited conduct, not by reason of the defendant’s legal status alone. This holding reduced Dunford’s number of convictions from fourteen to seven. The court of appeals further held that Dunford’s possession of six firearms and ammunition did not constitute seven acts of possession under 18 U.S.C. § 922(g), but rather one. The court reasoned that the statute is not clear as to what conduct is prohibited: possession of any firearm or ammunition could arguably occur every time a person picks up a different firearm; the statutory language does not delineate whether possession of a six-shooter loaded with six bullets constitutes one or two or seven violations. Interpreting 18 U.S.C. § 1202(a), the predecessor to § 922(g), the court had held that when a convicted felon acquires two or more firearms in one transaction and stores and possesses them together, he commits only one offense under the statute. *See United States v. Mullins*, 698 F.2d 686 (4th Cir. 1983). Applying that rule, the court held that Dunford’s possession of the six firearms and ammunition, seized at the same time from his house, supports only one conviction under 18 U.S.C. § 922(g).

See United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998), §1B1.1, p. 1.

United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994). The district court did not err in enhancing the defendant’s sentence based on his two prior felony convictions of a “crime of violence” pursuant to USSG §2K2.1(a)(2). The defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He argued that his prior state conviction for involuntary manslaughter was not a “crime of violence” because it was not a specific intent crime and because the catchall phrase of USSG §4B1.2 applies only to crimes against property. The circuit court relied on USSG §4B1.2, application note 2 which specifically includes manslaughter within the definition of a “crime of violence.” Although the circuit court acknowledged that the application note does not distinguish between voluntary and involuntary manslaughter, it followed United States v. Springfield, 829 F.2d 860 (9th Cir. 1987), in which the Ninth Circuit held that involuntary manslaughter, by its nature, “involves the death of another person [and] is highly likely to be the result

of violence. It thus comes within the intent, if not the precise wording of section 924(c)(3)[(B)]." *Id.* at 863.

§2K2.4 Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

United States v. Hamrick, 43 F.3d 877 (4th Cir.) *cert. denied*, 516 U.S. 825 (1995). The district court did not err in concluding that the improvised dysfunctional incendiary letter bomb used by the defendant in his attempt to assassinate a United States Attorney was a "destructive device" under 18 U.S.C. § 924(c)(1). The defendant argued that the terms "firearm" and "destructive device" in section 924(c)(1) were interchangeable and thus the district court should have imposed the five-year sentence prescribed for use of a "firearm" instead of the 30-year sentence prescribed for use of a "destructive device." The circuit court, convening en banc, ruled that while "firearm" is defined to include "destructive device," the terms are not interchangeable. Rather, a "destructive device" is a subset of "firearm," and the statute is unambiguous that use of a destructive device shall be punished by 30 years imprisonment. The circuit court, however, was divided, with two concurring opinions expressing doubt as to whether the dysfunctional bomb was a destructive device, and one dissenting opinion concluding that the bomb was not a "deadly or dangerous weapon" for the purpose of sentence enhancement.

United States v. Williams, 152 F.3d 294 (4th Cir. 1998). The defective indictment charging defendant with "possessing," rather than "using" or "carrying," a firearm in connection with a drug trafficking crime under 18 U.S.C. § 924(c) did not amount to plain error. The defendant raised his argument for the first time on appeal; the court of appeals held that, under the more forgiving standard for post-verdict review, the argument fails. The mere failure to track the precise language of the statute does not, without more, constitute error. The imprecision did not render defendant unable to prepare an adequate defense, or to be aware of the charge against him.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Campbell, 94 F.3d 125 (4th Cir.), *cert. denied*, 520 U.S. 1242 (1997). The district court correctly determined that the defendant's manslaughter conviction was a crime of violence included in the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(f) and, therefore, properly applied a 16-level enhancement to the defendant's sentence. The defendant argued that the district court improperly applied the statute because his underlying "aggravated felony" conviction occurred in 1989 which precipitated the amendment date that extended the definition of an "aggravated felony" to include crimes of violence. The appellate court disagreed, and relied chiefly on United States v. Garcia-Rico, 46 F.3d 8 (5th Cir. 1995), in holding that the obvious intent of the amendment was to allow the predicated offenses to be used as enhancement penalties for those aliens who had been deported after being convicted of an aggravated felony. Additionally, the court noted that in considering a sentence under §2L1.2(b)(2), all prior felonies, no matter how ancient, were relevant in the determination of a sentence.

Part S Money Laundering and Monetary Transaction Reporting

§2S1.1 Laundering of Monetary Instruments

United States v. Barton, 32 F.3d 61 (4th Cir. 1994). The defendant pleaded guilty to attempted money laundering. The district court properly rejected the defendant's argument that USSG §2S1.1(b)(2)'s definition of "value of the funds" should be determined by the amount of money actually used in the government sting. Rather, the "value of the funds" is the amount of money the defendant agreed to launder. To hold otherwise would allow the government to affect a sentencing variable simply by adjusting the amount of flash money used, and it would ignore the amount the defendant agreed and intended to launder. The defendant further argued that the three-level increase under USSG §2S1.1 for laundering drug proceeds did not apply to him because the 1989 version of the guideline sanctions only actual knowledge that the money was the result of a drug transaction, not mere belief that the funds were drug proceeds. Although the defendant believed the money was the result of a drug distribution, in reality it was government sting money. The circuits that have addressed this issue have reached different conclusions. The Eleventh Circuit held that mere belief is "sufficient to trigger an enhancement under the 1989 version of the guideline." United States v. Perez, 992 F.2d 295 (11th Cir. 1993). The Fifth Circuit, however, held that actual knowledge of the source of the funds is required. United States v. Breque, 964 F.2d 381 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1253 (1993). This court, following the holding of the Fifth Circuit, cited a subsequent amendment to the guideline which added the words "or believed," and its stated purpose to reflect the enactment of a new law which addressed defendants caught in government stings, to support its interpretation that the earlier version of the guideline did not sanction "belief."

CHAPTER THREE: *Adjustments*

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Nicolauo, 180 F.3d 565 (4th Cir.), *cert. denied*, 1997 WL 784784 (Nov. 1, 1999). The district court did not err in applying a leadership enhancement after the defendant's related offenses are grouped. The defendants were convicted of conducting an illegal gambling business, money laundering, and income tax charges. After grouping the offenses, the district court applied a four-level enhancement for leadership in the organization pursuant to §3B1.1(a). The defendant argued that the role adjustment should have been applied to individual offenses before grouping. The appellate court rejected this reasoning, holding that the law in the Fourth Circuit is clear that a role in the offense adjustment is applied after related offenses are grouped. *See United States v. Hartzog*, 983 F.2d 608 (4th Cir. 1993). Furthermore, the appellate court concluded that defendant's gambling offenses were relevant conduct under the guidelines because they occurred during the commission of, and in preparation for, "the money laundering. USSG §1B1.3(a)(1). Without the gambling operation, there would have been no ill-gotten gains to launder. The gambling organization was relevant conduct under §1B1.3(a)(2) because the money laundering counts themselves were grouped based on the amount of money laundered under §3D1.2(d).

United States v. Turner, 198 F.3d 425 (4th Cir. 1999). The appellate court held that since the offense of intentionally killing and causing intentional killing of individual while engaging in continuing criminal enterprise did not include supervisory role as an element of the offense, a two-point adjustment, pursuant to §3B1.1(c) for defendant's role in the offense was not impermissible double counting. The defendant was convicted of engaging in a continuing criminal enterprise (CCE), intentionally killing an individual while engaging in a CCE, and racketeering charges. The district court found that the defendant had a leadership role in the murder and applied a §3B1.1(c) enhancement. The defendant contended that the intentionally killing and causing the intentional killing of an individual while engaged in a CCE, already includes a defendant's supervisory role as an element, and that the enhancement is double counting. The appellate court concluded that although conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 includes a supervisory role as an element, the § 848(e)(1)(A) offense does not include (any person who intentionally kills or causes the intentional killing of another in furtherance of continuing criminal enterprise. Therefore, because the § 848(e)(1)(A) offense does not include a supervisory role as an element, the district court's application of an adjustment for the defendant's role in the offense is neither double counting, nor impermissible.

§3B1.2 Mitigating Role

See United States v. Washington, 146 F.3d 219 (4th Cir.), *cert. denied*, 525 U.S. 909 (1998), §1B1.8, p. 3.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999). The district court did not err in applying an abuse of trust enhancement, pursuant to §3B1.3. The defendant, a real estate agent, used client's financial information to obtain credit cards. He would then access the victim's mail by using keys to the home provided by the client. The defendant contended that real estate agents do not occupy a position of trust, or in the alternative, that the only victims were the banks, with whom he held no position of trust. The appellate court rejected the defendant's argument, noting that in the Fourth Circuit, a mechanistic approach to the abuse of trust departure that excludes defendants from consideration based on their job titles has been rejected. See United States v. Gordon, 61 F.3d 263 (4th Cir. 1995). The appellate court noted that several factors should be examined in determining whether a defendant abused a position of trust. Those factors include: 1) whether the defendant had either special duties or special access to information not available to other employees; 2) the extent of discretion the defendant possesses; 3) whether the defendant's acts indicate that he is "more culpable than the others" who are in positions similar to his and engage in criminal acts; and 4) viewing the entire question of abuse of trust from the victim's perspective. The appellate court stated that in reviewing the factors to the defendant's case, the district court did not err in determining that the defendant held a position of trust. First, the defendant had special access to information as a real estate agent. The agency's clients not only gave the agency confidential information, but also keys to their homes. In addition, the defendant's position made his criminal activities harder to detect. Finally, although the banks may have ultimately borne the financial burden, the clients were victimized as well because their identities and credit histories were used to facilitate the crime.

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). The district court erred in applying a §3B1.3 special skill enhancement. The defendant operated a tax preparation business out of his convenience store. He is not an accountant and has no special training in the area of tax preparation. The defendant was convicted of conspiracy to defraud the government and filing fraudulent claims. The district court applied a §3B1.3 special skills enhancement, relying on the fact that the defendant used some special skills, and that he availed himself of services of co-conspirators who had special skills. The appellate court reversed, concluding that the defendant did not have special skills, and that his co-conspirators skills were not relevant to the enhancement. The appellate court noted that "role in the offense" adjustments, such as the special skill enhancement, are based on a defendant's status, not based on a co-conspirator's action. See United States v. Moore, 29 F.3d 175 (4th Cir. 1994). Therefore, to the extent the district court relied on the special skills of the defendant's co-conspirators, it committed clear error. The district court also erred in its interpretation of the guidelines by concluding that tax preparation as practiced by the defendant was a special skill. The appellate court noted that a special skill usually requires substantial education, training or licensing, and that the record reflected that the defendant did not have any formal training in the areas of tax preparation. The defendant only had experience in tax preparation, a skill that millions of Americans exercise every year. His role in the conspiracy was to gather information from clients and to fabricate dependents, income information, filing status, and tax credit claims. These are not skills that one normally obtains through substantial training. Thus, the appellate court reversed the district court, concluding that the defendant did not possess a special skill within the meaning of §3B1.3.

United States v. Mackey, 114 F.3d 470 (4th Cir. 1997). The defendant worked as one of two group leaders in Sales Audit Department at Woodward and Lothrop Department Stores. She held this position for ten years. The defendant used her computer authorization code to perpetrate fraudulent returns of merchandise credits totaling approximately \$40,000. The district court enhanced the

defendant's sentence two levels under USSG §3B1.3 of the sentencing guidelines for "Abuse of Position of Trust or Use of Special Skill." The defendant argued that the enhancement was unwarranted because her position does not fall within the definition of "public or private trust." The defendant relies on United States v. Helton, 953 F.2d 867 (4th Cir. 1992), to support her argument that her position is functionally equivalent to an ordinary bank teller. The district court rejected defendant's argument and distinguished Helton. The defendant was one of two group leaders in the department and possessed a computer authorization code that others did not and used that code to conceal the fraudulent transactions. The fraud committed by the teller in Helton did not require any special access. The appeals court affirmed the district courts conclusions and the two-level enhancement.

See United States v. Moore, 29 F.3d 175 (4th Cir. 1994), §1B1.3, p. 2.

Part C Obstruction

§3C1.1 Obstruction or Impeding the Administration of Justice

United States v. Gormley, 201 F.3d 290 (4th Cir. 2000). Defendant was convicted of conspiracy to defraud the United States and filing fraudulent tax return claims in connection with a rapid refund enterprise. Defendant appealed only his sentence specifically with respect to an enhancement for obstruction of justice and an enhancement for use of a special skill. After the trial, but before sentencing, the probation officer charged with preparing the presentence report interviewed the defendant. According to the probation officer, the defendant denied knowingly listing false information on the tax returns, recording only the information provided to him by his clients, the validity of which he did not investigate. As a result, the defendant denied engaging in any criminal activities. Noting a "denial of guilt" exception to the obstruction of justice enhancement (*see* USSG §3C1.1, comment. (n.1)), the appellate court nevertheless affirmed its application inasmuch as the defendant's statements to the probation officer "went beyond merely denying his guilt and implicated his taxpayer clients in the scheme to defraud the IRS," and were material inasmuch as the statements could have affected the sentence ultimately imposed. *See* USSG §3C1.1, comment. (n.3(h)); United States v. Dedeker, 961 F.2d 164, 167 (11th Cir. 1992) (stating threshold for materiality is "conspicuously low"). The appellate court, in dicta, also noted that it declined to adopt the Eleventh Circuit's position in United States v. Gardiner, 955 F.2d 1492 (11th Cir. 1992), that a presentence explanatory assertion of innocence, similar to one in the instant case, could not be material to sentencing as a matter of law inasmuch as to believe the assertion would require disregarding the jury's verdict.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 120 S. Ct. 259 (1999). The appellate court upheld the district court's decision not to group the defendant's attempted espionage and conspiracy to commit espionage convictions for sentencing purposes. The district court determined that the defendant's conduct was not a single course of conduct with a single objective as contemplated by §3D1.2. The appellate court stated that counts which are part of a single course of conduct with a single criminal objective and represent one composite harm to the same victim are to be grouped together. However, if the defendant's criminal conduct constitutes single episodes of

criminal behavior, each satisfying an individual—albeit identical—goal, then the district court should not group the offenses. In the case at bar, the district court properly determined that the counts of conviction did not constitute a single course of conduct with a single objective, and that the counts should not be grouped together. The appellate court noted that the district court carefully considered the undisputed facts that the counts depended upon two separate time periods, involved the supplying of information to two distinct sets of people in two separate locations, and resulted in the passage of an entirely different category of sensitive materials involving separate and distinct instances of harm. Furthermore, the defendant's actions were not connected by a common criminal objective.

United States v. Walker, 112 F.3d 163 (4th Cir. 1997). The district court correctly calculated the defendant's sentence involving mail fraud and money laundering. The district court grouped the counts together pursuant to USSG §3D1.2(d) and applied the higher base offense level for money laundering under USSG §3D1.3(b). Along with other adjustments, the defendant received a four-level specific offense characteristic increase under the money laundering guideline because the fraudulent scheme involved between \$600,000 and \$1,000,000. The defendant argued that in determining his specific offense characteristic, the district court should have considered only \$5,051.01 in fictitious interest payments specifically identified in the money laundering counts of the indictment. The government argued that all of the allegations in the mail fraud counts, which the defendant conceded involved \$850,913.59, were incorporated into the money laundering counts by the grand jury. Furthermore, the facts of the case established that the mail fraud and money laundering crimes were interrelated. The Fourth Circuit held that the defendant's money laundering was part of the fraudulent scheme because the funds were used to make fictitious interest payments. The defendant essentially conceded the offenses were closely related when he pleaded guilty to money laundering under the particular provision of the statute that forbids conducting financial transactions involving the proceeds of a specified unlawful activity "with the intent to promote the carrying on of [the] specified unlawful activity." Additionally, the circuit court found that the sentencing guidelines permitted the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating his specific offense characteristic under the money laundering guideline. The court relied on the Eleventh Circuit's decision in United States v. Mullens, 65 F.3d 1560, 1564 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 1337 (1996), which held that a court was "required to consider the total amount of funds that it believed was involved in the course of the criminal conduct" when determining the specific offense characteristic under the money laundering statute.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Dickerson, 114 F.3d 464 (4th Cir. 1997). The district court erred in giving the defendant credit for acceptance of responsibility and for reducing his sentence pursuant to USSG §3E1.1. On appeal, the government argued that the district court improperly adjusted the defendant's sentence based on two grounds, the defendant saved both the court and the government real time in both having to go through with a jury trial, and because the defendant never indicated at trial that he did not accept the fact that he lied. The Fourth Circuit held that the lower court erred in basing the defendant's sentence reduction on those two factors. The guidelines make no distinction between a bench and a jury trial. The relevant distinction is between a defendant who puts the government to its burden of proof at trial and a defendant who does not request a trial. *See* USSG §3E1.1, Comment 2. Additionally, the circuit court found that, at least in part, the defendant went to trial to attempt to prove that his lies to the grand jury were not "material." Because materiality is an essential element of any

perjury offense, in asserting his lies were not "material," the defendant challenged his "factual guilt." For these reasons, the defendant did put the government to its burden and, therefore, the defendant was not entitled to an acceptance of responsibility reduction.

United States v. Ruhe, 191 F.3d 376 (4th Cir. Aug. 31, 1999). Defendant was convicted of conspiring to transport stolen property and aiding and abetting. Defendant appealed the district court's denial of granting an adjustment for acceptance of responsibility, arguing that it was clear error for the district court to refuse to consider his polygraph evidence at sentencing given that such evidence clearly entitled him to a downward departure. The polygraph evidence, however, only indicated defendant's continued denial of responsibility because it only served as evidence that he did not realize that the property was stolen, *i.e.*, that he did not commit the crime for which he was charged. Consequently, the district court did not commit any error in denying the decrease for acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Stewart, 49 F.3d 121 (4th Cir. 1995). The district court erred by enhancing the defendant's criminal history pursuant to USSG §4A1.1(e) based upon his 24-day incarceration pending a state parole revocation hearing that resulted in neither revocation nor reincarceration. The defendant pleaded guilty to being a felon in possession of a firearm in 1992. In 1983 he had been convicted of armed robbery in the state of Maryland, and was paroled after serving five years of his nine-year sentence. The state issued a warrant for his arrest for burglary and trespass eight months after his release, but it was not served until 1992, four years after the alleged parole violations and almost a year after the expiration of the parole period. The defendant was held in detention for 24 days pending his parole revocation hearing. Although he was found guilty of the parole violations, the Parole Commission did not revoke parole or reimpose a sentence, and he was released. The federal district court added two points to the defendant's criminal history pursuant to §4A1.1(e) because it considered this detention to constitute "imprisonment on a sentence." The circuit court, however, construed USSG §4A1.1(e) to apply to the defendant only if his pre-revocation detention amounted to an extension or continuation of the original nine-year sentence for his 1983 conviction. The circuit court ruled that there was no basis for holding that the detention amounted to an extension of an original "imprisonment on a sentence" within the meaning of the guidelines, particularly since the defendant's parole was not revoked and the defendant was not reincarcerated. The circuit court further held that USSG §4A1.1(e) "does not contemplate the assessment of criminal history points on the basis of detentions of defendants who are awaiting parole revocation hearings when those hearings do not result in reincarceration or revocation of parole." The appellate court vacated the sentence and remanded the case for resentencing.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999). Defendant was convicted of conspiracy to possess marijuana with intent to distribute and aiding and abetting possession with intent

to distribute marijuana. Defendant appealed the district court's sentencing him as a career offender. Pursuant to USSG §4B1.1(3), to qualify as a career offender, a defendant must have been convicted of at least two prior felonies of either a crime of violence or a controlled substance. Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A1.2, app. (n.3). Consequently, the two prior felony convictions properly were considered as separate for purposes of qualifying the defendant as a career offender for sentencing purposes.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Bacon, 94 F.3d 158 (4th Cir. 1996). The district court erred in relying upon defendant's allegation that newly discovered evidence proved his innocence of a prior state offense and in refusing to enhance defendant's sentence as required under USSG §4B1.1. The court held that the district court was required to count the previous state offense as a predicate offense because the defendant did not allege that he was deprived of counsel or any other constitutional right. Once a conviction is found to meet the requirements of a predicate offense under USSG §4A1.2, Application Note 6 to this section requires the conviction to be considered unless it has been reversed, vacated or invalidated in a prior case. A defendant may not collaterally attack his prior conviction unless federal or constitutional law provides a basis for such an attack. The court noted that 28 U.S.C. § 994 was enacted to ensure that career offenders received sentences near the maximum term authorized by law and omitted any authority for collateral attacks under this provision. Therefore, the legislature did not intend to give career offenders the right of collateral attack on their prior convictions for the purpose of sentence enhancement. The court concluded that this particular defendant lacked authority for his collateral attack. As a policy matter, unrestricted challenges to predicate offenses would place a substantial burden upon prosecutors forced to defend the predicate offenses and judges forced to hear the appeals. The court vacated and remanded the sentence for recalculation characterizing the defendant as a career offender.

United States v. Johnson, 114 F.3d 435 (4th Cir.), *cert. denied*, 522 U.S. 903 (1997). For career offender calculation purposes, the date the prior conviction was sustained should control, not the date of later sentencing as a career offender. The defendant argued that the district court's sentencing of him as a career offender based on his prior conviction for assault on a female, which at the time of the defendant's conviction carried a maximum penalty of two years, could not be used in the career offender analysis because that offense now carries only a 150-day maximum. The defendant argued that North Carolina's recent amendment rendered his prior conviction ineligible for career offender calculations. As a case of first impression for the federal courts, the Fourth Circuit held that the date of the conviction pursuant to USSG §4B1.2(3) of the guidelines provides that the conviction is sustained on the date the guilt of the defendant is established. The defendant sustained his conviction for assault on a female in 1986. In 1986, that offense was punishable by a statutory maximum of two years. Thus, the assault conviction was properly considered a prior felony conviction for guideline purposes.

United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). In addressing an issue of first impression, the Fourth Circuit reversed the district court's finding that the defendant's instant offense of conspiracy to distribute cocaine did not qualify as a controlled substance offense for career offender purposes. The Fourth Circuit joined the Third, Seventh, Eighth, and Ninth Circuits in concluding that 28 U.S.C. § 994(h) was not the sole source of authority for USSG §4B1.1, rather, the career offender guideline was promulgated pursuant to the Commission's general authority under section 994(a) as well as the specific mandate under section 994(h). *See* United States v. Heim, 15 F.3d 830 (9th Cir. 1994); United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Hightower, 25 F.3d 182 (3d Cir. 1994); *but see* United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993); United States v. Bellazerius, 24 F.3d 698 (5th Cir. 1994).

United States v. Martin, 215 F.3d 470 (4th Cir. 2000). Defendant was indicted for bank robbery, *see* 18 U.S.C. § 2113(b), but was convicted of bank larceny, a lesser included offense. Defendant appealed the district court's order sentencing him as a career offender pursuant to USSG §4B1.1. The appellate court agreed with defendant's contention that bank larceny is not a crime of violence, even in the abstract, and therefore, he was not eligible to be sentenced as a career offender. According to the panel, bank larceny neither is one of the qualifying offenses enumerated in USSG §4B1.2(a)(2), nor is bank larceny suggested to be a qualifying offense in the accompanying commentary. Moreover, bank larceny does not contain as an element the use, attempted use, or threatened use of physical force. Even assuming, but not deciding, that when a jury convicts a defendant of a lesser included offense, it is permissible for sentencing purposes to consider those facts alleged in the original indictment that correspond to the elements of the lesser included offense, the result does not change. Conforming the indictment to the bank larceny conviction requires deletion of all references to violence. As the appellate court may not consider all the allegations in the indictment charger the defendant, but only those that directly correspond to the elements of the offense of conviction, the defendant's sentence as a career offender was in error.

United States v. Neal, 27 F.3d 90 (4th Cir. 1994). In considering an issue of first impression in the federal courts, the appellate court reversed the district court's sentencing calculation, counting a New York state drug possession conviction under §4B1.1, the career offender guideline. Section 4B1.1 requires the defendant to have at least two prior felony convictions for a crime of violence or a controlled substance offense. This court joins the Ninth, Fifth, Tenth and Eleventh Circuits in recognizing that simple possession of drugs is not considered a "controlled substance offense." The New York statute under which the defendant was convicted only requires an intent to distribute for one section of the statute; the other sections pertain to simple possession. Because it is unclear which section of the statute applied to the defendant's convictions, it was improper for the court to count this conviction for purposes of applying the career offender guideline.

United States v. Williams, 29 F.3d 172 (4th Cir. 1994). The district court erred in classifying the defendant as a career offender pursuant to USSG §4B1.1. The defendant was involved in and pleaded guilty to a cocaine distribution conspiracy that existed between 1988 and 1989. The district court determined he was a career offender and used as predicate offenses the defendant's convictions for second degree burglary, imposed in September 1991, and attempted burglary, imposed in October 1991. He argued that the predicate offenses were not "prior felony convictions" because they occurred subsequent to the instant offense. The circuit court agreed and held that "convictions sustained subsequent to the conduct forming the basis for the offense at issue cannot be used to enhance a defendant's status to career offender." *See* United States v. Bassil, 932 F.2d 342 (4th Cir. 1991).

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Huggins, 191 F.3d 532 (4th Cir. 1999). Defendant was convicted of conspiracy to possess marijuana with intent to distribute and aiding and abetting possession with intent to distribute marijuana. Defendant appealed the district court's sentencing him as a career offender. Pursuant to USSG §4B1.1(3), to qualify as a career offender, a defendant must have been convicted of at least two prior felonies of either a crime of violence or a controlled substance. Section 4A1.2(a)(2) provides that prior sentences imposed in unrelated cases are counted separately, but prior sentences imposed in related cases are counted together as a single sentence, such as when they were consolidated for trial or sentencing. Although the defendant's two prior felony convictions were consolidated for sentencing, because there was an intervening arrest, the sentences were not related. *See* USSG §4A1.2, app. (n.3). Consequently, the two prior felony convictions properly were considered as separate for purposes of qualifying the defendant as a career offender for sentencing purposes.

See United States v. Payton, 28 F.3d 17 (4th Cir.), *cert. denied*, 513 U.S. 976 (1994), §2K2.1, p. 15.

§4B1.4 Armed Career Criminal

United States v. Cook, 26 F.3d 507 (4th Cir.), *cert. denied*, 513 U.S. 953 (1994). The district court erred in concluding that "obstruction of justice" cannot serve as a predicate offense under the Armed Career Criminal Act when the applicable state law broadly defines it to include violent and nonviolent means. The Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), held that the district court may examine the "indictment or information and jury instructions" to determine whether the burglary for which the jury convicted the defendant was violent. In following the majority of courts of appeals, this court agreed that Taylor is not restricted to burglary offenses and may be applied to all predicate convictions. *See* United States v. Mendez, 992 F.2d 1488 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 262 (1993); United States v. Harris, 964 F.2d 1234 (1st Cir. 1992); Lowe v. United States, 923 F.2d 528 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2066 (1991).

United States v. Letterlough, 63 F.3d 332 (4th Cir.), *cert. denied*, 516 U.S. 955 (1995). The appellate court affirmed the district court's enhancement of the defendant's sentence under the provisions of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). The defendant pleaded guilty to being a felon in possession of a firearm, and was sentenced to 84 months imprisonment and five years supervised release. On appeal the defendant argued that two of his prior convictions were not "committed on occasions different from one other." The two prior felony convictions consisted of two undercover drug sales made on July 31, 1990, to a single undercover police officer. The appellate court ruled that each of the defendant's drug sales was a complete and final transaction, and therefore, an independent offense, noting that Congress intended to include within the scope of the ACCA only those predicate offenses that constitute an occurrence unto themselves. The circuit court recognized and adopted the test applied by the majority of the circuit courts to determine whether the ACCA applies to a defendant's prior crimes: convictions occur on occasions different from one another "if each of the prior convictions arose out of a `separate and distinct criminal episode.'" United States v. Hudspeth, 42 F.3d 1015, 1019 (7th Cir. 1994) (*en banc*) (collecting cases) (emphasis in original) (citation omitted), *cert. denied*, 115 S. Ct. 2252 (1995). The circuit courts have applied a number of factors to determine when more than one conviction constitutes a separate and distinct criminal episode, including "whether the offenses arose in different geographic locations; whether the

nature of the offenses was substantively different; and whether the offenses involved multiple victims and multiple criminal objectives." The circuit court found the Fifth Circuit's decision in United States v. Washington, 898 F.2d 439 (5th Cir.), *cert. denied*, 498 U.S. 842 (1990), to be particularly instructive because of its similar facts. In Washington, the defendant robbed a convenience store and returned to the very same store within a few hours and robbed it again. The Fifth Circuit affirmed the district court's enhancement decision, holding that "where multiple offenses are not part of a continuous course of conduct, they cannot be said to constitute either a criminal spree or a single criminal transaction for purposes of section 924(e)." *Id.* at 441. The circuit court ruled that likewise Letterlough's two convictions did not arise from a continuous course of criminal conduct, but instead constituted two complete and discrete commercial transactions and, therefore two separate and distinct episodes.

United States v. O'Neal, 180 F.3d 115 (4th Cir.), *cert. denied*, 120 S. Ct. 433 (1999). The district court did not err in sentencing the defendant as an armed career criminal under 18 U.S.C. § 924(e) and USSG §4B1.4. The district court relied on a 1977 North Carolina felony larceny conviction. The defendant argued that the conviction should not count because the government did not include the conviction in the notice it filed with the district court of its intent to seek an enhanced sentence. The appellate court concluded that the presentence report gave the defendant adequate notice that the 1977 conviction was a possible predicate conviction. The appellate court stated that there is no requirement that the government list, either in the indictment or "in some formal notice" the predicate convictions on which it will rely for a section 924(e) enhancement. *See United States v. Alvarez*, 972 F.2d 1000 (9th Cir. 1992). The appellate court added that although the defendant has a right to adequate notice of the government's plan to seek such an enhancement, the listing of these convictions in the presentence report is more than adequate to provide such notice. Because the presentence report explicitly relied on the 1977 conviction as a possible predicate for subjecting the defendant to an enhanced sentence, the defendant adequate notice.

CHAPTER FIVE: *Determining the Sentence*

Part B Probation

§5B1.4 Recommended Conditions of Probation and Supervised Release (Policy Statement)

United States v. Wesley, 81 F.3d 482 (4th Cir. 1996). The district court did not abuse its discretion in ordering the defendant to abstain from alcohol as a condition of supervised release. Pointing to United States v. Pendergast, 979 F.2d 1289 (8th Cir. 1992), the defendant contended that this condition deprived him of his liberty and freedom, and was not "fine tuned" as such restrictions on freedom should be. The circuit court distinguished this case, however, by indicating that the defendant in Pendergast did not have a history of alcohol abuse, while the defendant in this case has prior convictions for alcohol related offenses and had tested positive for drugs on various occasions. The circuit court joined with the First and Ninth Circuits in holding that this condition of supervised release was acceptable under such circumstances.

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Ivester, 75 F.3d 182 (4th Cir.), *cert. denied*, 518 U.S. 1011 (1996). The district court did not err in denying the defendant's request that he be sentenced under the safety valve provision of USSG §5C1.2. In denying the defendant's request, the district court found that the defendant had failed to provide the government with any truthful information concerning his crime. The defendant contends that he is entitled to the departure because he would have provided truthful information to the government had it asked for any. On appeal, the defendant raised an issue of statutory construction that had not been decided by any circuit court: whether pursuant to section 3553(f), defendants are required to affirmatively act to inform the government of their crimes, or whether it is sufficient that they are willing to be completely truthful. Although noting that a defendant cannot be denied section 3553(f) relief merely because of the uselessness of the information provided to the government, the court determined that granting a section 3553(f) relief to defendants who are merely willing to be completely truthful would obviate the statutory requirement that defendants "provide" information. Therefore, defendants seeking to avail themselves of downward departures under USSG §5C1.2 bear the burden of affirmatively acting to ensure that the government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Alalade, 204 F.3d 536 (4th Cir. 2000). The appellate court held that the district court had no discretion under the Mandatory Victims Restitution Act of 1996 (MVRA) to order the defendant to pay restitution in an amount less than the full amount of each victim's loss by allowing an offset for the value of fraudulently obtained property the government seized from the defendant and retained in administrative forfeiture. The defendant obtained \$667,858.18 from various financial institutions through credit card fraud, and pled guilty to one count of credit card fraud. The government ultimately seized and retained \$78,982.02 worth of items from the defendant in an administrative forfeiture. The district court ordered the defendant to pay restitution in the amount of \$667,858.18. The defendant appealed, arguing that the restitution amount should be offset by the \$78,982.02 seized by the government. The defendant relied upon pre-MVRA case law holding that the district court has discretion to reduce the amount of restitution by amounts seized from the defendant in forfeiture proceedings. *See United States v. Kahn*, 53 F.3d 507 (2d Cir. 1995). The appellate court examined the MVRA, and concluded that the Act does not grant the district court discretion to reduce the amount of restitution required to be ordered by an amount equal to the value of property seized by the government in administrative forfeiture. The appellate court noted that with the passage of the MVRA, Congress completely deleted the language of the Victim and Witness Protection Act affording the district court discretion in cases such as this to consider any factor it deemed appropriate in determining the amount of restitution to be ordered. The MVRA requires the district court to order restitution to each victim in the full amount of each victim's losses as determined by the district court. Thus, the appellate court held that the district court lacked discretion under the MVRA to offset the restitution amount by the value of the items seized by the government.

United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). The appellate court vacated the defendant's restitution amount because the amount of restitution depends on the amount of loss, which the district court was ordered to recalculate. The appellate court did address the defendant's challenges to the restitution order to guide the district court on remand. The district court ordered the defendant to pay restitution in the full amount of the loss and a \$200 special assessment, and stated that both were immediately due and payable in full. The district court also instructed that if the defendant

is unable to pay restitution owed immediately, restitution shall be paid in installments of \$200 dollars per month to begin 60 days after the defendant's release from prison. Furthermore, the probation officer shall take into consideration the defendant's economic status as it pertains to his ability to pay restitution ordered and shall notify the Court of any changes that need to be made to the payment schedule. The appellate court rejected the defendant's argument that the district court did not satisfy its statutory obligations to specify the manner and schedule by which he was ordered to pay restitution because the court ordered the entire restitution amount immediately due. The appellate court concluded that the district court effectively discharged its responsibility to set a payment schedule when it instructed that if the defendant were unable to pay the full restitution amount immediately, he could pay 60 days after his release.

However, the appellate court did hold that the district court must make a finding that "keys Dawkins financial situation to the restitution schedule ordered or finds that the order is feasible." The MVRA clearly requires a sentencing court to consider the factors listed in 18 U.S.C. § 3664(f)(2) and the court must make a factual finding keying the statutory factors to the type and manner of restitution ordered. The appellate court concluded that the record is devoid of any factual finding that keys the defendant's financial situation to the restitution ordered or finds that the restitution order is feasible. Thus, when the district court reconsiders the restitution order on remand, it must make such a finding on the record.

The appellate court concluded that the district court did not illegally delegate its judicial authority by allowing the probation officer to adjust the restitution payment schedule after considering the defendant's economic status. The appellate court noted that a district court may not delegate to the probation officer the final authority to establish the amount of defendant's partial payment of either restitution. *See United States v. Miller*, 77 F.3d 71 (4th Cir. 1996); *United States v. Johnson*, 48 F.3d 806 (4th Cir. 1995). Here, the district court ordered the probation officer to take Dawkins financial situation into consideration and "notify the Court of any changes that may need to be made to the payment schedule." The appellate court concluded that the court retained both the right to review the probation officer's findings and to exercise ultimate authority regarding the payment of restitution; therefore, the court did not illegally delegate its authority.

§5E1.2 Fines for Individual Defendants

United States v. Blake, 81 F.3d 498 (4th Cir. 1996). The district court erred in ordering the defendant to pay restitution to the persons from whom he stole credit cards. The defendant pleaded guilty to one count of fraudulent use of unauthorized access devices in violation of 18 U.S.C. § 1029(a)(2). At sentencing the district court ordered the defendant to pay restitution to the persons from whom he stole the credit cards. On appeal, the defendant argued that because the persons from whom he stole the credit cards are not victims of his offense of conviction, their losses should not have been included in the restitution order. The Fourth Circuit agreed. Although noting that the Victim and Witness Protection Act ("VWPA") was amended to define "victim" as any person directly harmed by the defendant's criminal conduct, that new definition only applies if the offense involves "as an element" a scheme.

United States v. Hairston, 46 F.3d 361 (4th Cir.), *cert. denied*, 516 U.S. 840 (1995). The government challenged the district court's decision not to impose a fine on the defendant under guideline §5E1.2. The Fourth Circuit held that the district court must determine whether the defendant has proved his present and prospective inability to pay a fine, and remanded the case for reconsideration of the defendant's financial situation. The appellate court relied on §5E1.2(a) which states, "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is

unable to pay and is not likely to become able to pay any fine." The appellate court stated that "the defendant cannot meet his burden of proof by simply frustrating the court's ability to assess his financial condition."

United States v. Hyppolite, 65 F.3d 1151 (4th Cir. 1995), *cert. denied*, 517 U.S. 1162 (1996). The district court did not abuse its discretion in imposing a \$300,000 fine. The defendant refused to complete a personal financial statement for the presentence report and provided no evidence to show an inability to pay. The defendant bears the burden of demonstrating his present and future inability to pay. United States v. Hairston, 46 F.3d 361, 367 (4th Cir.), *cert. denied*, 116 S. Ct. 124 (1995).

Part G Implementing The Total Sentence of Imprisonment

§5G1.1 Sentencing on a Single Count of Conviction

United States v. Pillow, 191 F.3d 403 (4th Cir. 1999). Defendant was convicted, *inter alia*, of conspiracy to possess with intent to distribute methamphetamine. Pursuant to 21 U.S.C. § 851, the defendant was subject to a statutorily required minimum sentence of 240 months. However, the defendant's guideline range only was 188 - 235 months. As a result, the district court determined that the defendant's guideline sentence was 240 months, pursuant to USSG §5G1.1(b). Based upon the defendant's substantial assistance, the government filed motions for a downward departure from both the guidelines sentence and the statutorily required minimum sentence. The district court granted both motions, ultimately departing downward to 188 months imprisonment. Defendant appealed arguing that the district court erred in using 240 months as the starting point for calculating the downward departure, and should have used 188 months, the low-end of the otherwise applicable guideline range. The appellate court disagreed, and held that the starting point correctly was the statutorily required minimum sentence inasmuch the district court's decision to depart did not remove the fact that the defendant was otherwise subject to a statutorily required minimum sentence.

§5G1.3 Imposition of Sentence on Defendant Subject to Undischarged Term of Imprisonment

United States v. Johnson, 48 F.3d 806 (4th Cir. 1995). The defendant's sentence was vacated and remanded to the district court to apply USSG §5G1.3, where it was not clear from the record or the sentencing order whether the 46-month sentence was imposed to run concurrently or consecutively to the defendant's undischarged state sentence.

United States v. Mosley, 200 F.3d 218 (4th Cir. 1999). The appellate court held that when using the 1995 or later editions of the sentencing guideline dealing with the imposition of a sentence on a defendant who is subject to an undischarged term of imprisonment, the district court is not required to calculate a hypothetical combined guideline range. Instead, a sentencing court need only consider the relevant factors that §5G1.3(c) directs the court to consider. The defendant pled guilty to conspiring to distribute cocaine. The district court decided to run 48 months of his 72-month sentence consecutively to an undischarged term of imprisonment. The defendant appealed, arguing that under the current version of §5G1.3(c), the district court was required to add together the drug weights from the current offense and from the prior offense in order to create a hypothetical combined guideline range that would have applied if he had been sentenced for both offenses simultaneously. Had the district court created a hypothetical combined guideline range for both crimes, his sentence would have been at least 34 months less. The appellate court rejected the defendant's argument, finding that nowhere in the current §5G1.3(c) is that a requirement that a district court must fashion a hypothetical combined guideline range for a defendant with a prior undischarged term of imprisonment and

sentence him within that range. Prior to 1995, the Fourth Circuit had required district courts to create a hypothetical combined guideline range for a defendant and sentence the defendant within that range. *See United States v. Myers*, 66 F.3d 1364 (4th Cir. 1995), *superseded by rule as stated in United States v. Mosley*, 200 F.3d 218 (4th Cir. 1999); *United States v. Hill*, 59 F.3d 500 (4th Cir. 1995). However, §5G1.3 was amended in 1995 (Amendment 535) and now only requires courts to engage in a factor analysis before deciding whether to impose a sentence that is concurrent with, partially concurrent with, or consecutive to a prior undischarged term of imprisonment. The appellate court noted that Amendment 535 specifically states that its purpose in regard to §5G1.3(c) is to afford the sentencing court additional flexibility to impose the sentence. Thus, the district court did not have to calculate a hypothetical guideline range, and the appellate court affirmed the defendant's sentence.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995), *superseded by rule as stated in United States v. Mosley*, 200 F.3d 218 (4th Cir. 1999). The district court erred in not attempting to come within the defendant's combined guideline range as prescribed in USSG §5G1.3(c). If the defendant's crimes had all been prosecuted federally, his sentencing range would have been 262 to 327 months. The defendant's guideline range for the instant offense was 108 to 150 months. The court departed upwardly to the statutory maximum of 25 years, or 300 months, and ordered the sentence to run consecutively to the 40 years, or 480 months, the defendant had already been ordered to serve in state prison. The final sentence of 780 months exceeded the upper end of the defendant's hypothetical combined guideline range by 453 months (*i.e.*, almost 38 years). The circuit court remanded with instructions to recalculate the defendant's sentence in accordance with USSG §5G1.3. The circuit court noted that if the district court on remand should decide to use a method other than that outlined in USSG §5G1.3 for calculating the defendant's sentence, it must explain its reasons for doing so. *United States v. Stewart*, 59 F.3d 496, 498 (4th Cir. 1995).

United States v. Puckett, 61 F.3d 1092 (4th Cir. 1995). The district court did not err by ordering that the defendant's sentence for the instant offense run consecutively to his parole revocation sentence. The defendant unsuccessfully argued to have the present sentence run concurrently with his 1988 PCP sentence. Under USSG §5G1.3(c), the court must attempt to calculate the reasonable incremental punishment . . . under the commentary methodology, but may use another method if there is a reason to abandon the suggested penalty. In addition, the circuit court noted that Application Note 5 of USSG §7B1.3 states: ". . . any term of imprisonment imposed upon the revocation of probation or supervised release shall run consecutively to any sentence of imprisonment being served by the defendant." The circuit court found that although the district court did not specifically state that it was applying either USSG §5G1.3(c) or §7B1.3, its reasoning indicates that the appropriate factors were considered under the relevant guidelines. Furthermore, the district court listed several factors that formed the basis of its decision to have the present sentence run consecutively, including the frequency of the defendant's drug convictions, the severity of his PCP offense, and the court's desire not to minimize the punishments for two different, unrelated drug offenses.

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court erred in relying upon Application Note 5 of §5G1.3 to impose the statutory maximum term for solicitation on the defendant. The court of appeals held that the district court erroneously interpreted Note 5 to allow the imposition of the statutory maximum. Note 5, however, simply addresses the imposition of concurrent or consecutive terms of imprisonment when the defendant is faced with numerous terms of undischarged prison time. Nothing in Note 5 allows the district court to depart from the applicable guideline range. The court of appeals remanded for resentencing on this count.

Part H Specific Offender Characteristics

§5H1.6 Family Ties and Responsibilities

United States v. Wilson, 114 F.3d 429 (4th Cir. 1997). The district court abused its discretion in departing downward from the applicable guideline range. The defendant pled guilty to conspiracy to possess with the intent to distribute cocaine base. The district court held that the defendant was not entitled to a reduction in his sentence under USSG §2D1.1(b)(4) because the defendant had failed to carry his burden of demonstrating that the firearms he admitted to possessing were not possessed in connection with the conspiracy. The district court, however, did depart downward from the resulting guideline range because of the defendant's extraordinary family responsibilities. The government appealed, arguing that the district court abused its discretion in granting the downward departure. The circuit court applied the analysis of Koon v. United States, 116 S. Ct. 2035, 2044 (1996), and agreed and held that a fair review of the proceedings before the district court demonstrated that the defendant's deprived background was a motivating force behind the decision of the district court to depart. The district court, recognizing that USSG §5H1.12 prohibited a departure based on disadvantaged upbringing, attempted to justify the departure USSG §5H1.6, based on family ties and the defendant's ability to take care of his own children. The circuit court found that the defendant's family circumstances were not so extraordinary as to justify the departure. The circuit court found that the district court improperly departed, and vacated the sentence and remanded for resentencing.

Part K Departures

Standard of Appellate Review — Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Brock, 108 F.3d 31 (4th Cir. 1997). The district court erred in finding that it lacked the authority to consider a departure. At sentencing, the defendant sought a departure based on his post-offense rehabilitation efforts. The district court held that a departure was not authorized based on the circuit's prior ruling in United States v. Van Dyke, 895 F.2d 984 (4th Cir. 1990), that held that such rehabilitation efforts may not be used as a basis for a downward departure because the guidelines took such conduct into account. *See* USSG §3E1.1, comment. (n.1(g)) (stating that post-offense rehabilitation efforts should be taken into consideration in determining whether to grant acceptance of responsibility adjustment). The circuit court found that based on the analysis set forth in Koon v. United States, 116 S. Ct. 2035 (1996), post-offense rehabilitation efforts could form a proper basis for downward departure. Noting that post-offense rehabilitation efforts are taken into account in acceptance of responsibility determinations, the Court stated that such efforts could be a basis for a departure only "when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility adjustment is granted."

United States v. Hill, 70 F.3d 321 (4th Cir. 1995). The defendant appealed the extent of the downward departure based on his substantial assistance to the government. He asserted that the district court's decision to reduce his base offense level by only two levels was based on its erroneous consideration of a prison term imposed on him by the district court in Texas. The appellate court concluded that the sentence did not result from an incorrect application of the guidelines, and the appeal was an artful attempt to gain review of the district court's exercise of discretion. As such, the appeal was dismissed.

United States v. LeRose, 219 F.3d 335 (4th Cir. 2000). Defendant pleaded guilty to executing, aiding, and abetting a scheme and artifice to defraud a federal institution, and to filing a false income tax return. The government appealed the district court's imposition of a downward departure. The district court departed because it determined that the loss, \$3,364,958, overstated the seriousness of the offense in that the victim of the offense—a bank—delayed in confronting the defendant as to the offense conduct, and that the defendant was entitled to a reduction for substantial assistance even though the government declined to make the appropriate motion. Absent a determination of an unconstitutional or irrational motive on the part of the government, it was error for a district court to grant a reduction for substantial assistance without a government motion. *See United States v. Schafer*, 120 F.3d 505, 508 (4th Cir. 1997). The burden is on the defendant to make a substantial threshold showing that the government's refusal resulted from improper or suspect motives. *See Wade v. United States*, 504 U.S. 181, 186 (1992). In the instant case, the district court impermissibly shifted to the hearing portion of the Wade framework without first determining whether the defendant had met his threshold burden. When a defendant does not demonstrate an improper refusal by the government, the inquiry must come to an end. As a result, the departure was in error.

United States v. Pearce, 191 F.3d 488 (4th Cir. 1999). A district court's discretion to depart under §5K1.1 is "broad" but limited in two ways: (1) the factors it considers must relate to "the nature, extent and significance of the defendant's assistance"; (2) the extent of any departure must be "reasonable." The defendants were career offenders who pled guilty to conspiracy to purchase cocaine. The district court erroneously held that once the government files a 5K1.1 motion, the court has "total discretion." It then rejected the government's request for a 3-level downward departure for each defendant and departed downward from an offense level of 26 to 2 for defendant Pearce, notwithstanding that his substantial assistance was limited to his participation in a single controlled narcotics purchase that was set up by defendant Chapman. Similarly, it lowered Chapman's offense level from 26 to 6 based upon his participation in one controlled purchase and his setting up the second purchase for Pearce. The Fourth Circuit reversed and remanded both cases for resentencing. With respect to Pearce, it noted that while the district court did not articulate the specific reasons for its departure, the counsels' arguments and evidence indicate that it apparently considered irrelevant factors; failed to give substantial weight to the government's evaluation; failed to give its reasons for departing; and based on the record, departed to an unreasonable extent. With respect to Chapman, the district court considered appropriate factors, but the 20-level departure was "unreasonable in extent" given his level of cooperation.

United States v. Pillow, 191 F.3d 403 (4th Cir. 1999), *cert. denied*, 2000 WL 38454 (U.S. Feb. 22, 2000). In a 2-1 decision, the Fourth Circuit determined that the starting point for calculating a downward departure under USSG §5K1.1 and 18 U.S.C. § 3553(e) was the statutory minimum sentence—not what the guidelines would be absent the statutory minimum sentence. The defendant had been convicted by a jury of narcotics charges and was sentenced to the statutory minimum sentence pursuant to USSG §5G1.1. Thereafter, the government filed a 5K1.1 motion based upon the defendant's subsequent cooperation. The Fourth Circuit rejected the defendant's contention that section 3553(e) restored the otherwise applicable guideline range that would have applied absent the mandatory minimum sentence because the plain language of the statute "allows for a departure from, not the removal of, a statutorily required minimum sentence." Specifically, section 3553(e) provides for a sentence "below" a statutorily required minimum sentence (*i.e.*, a departure). In contrast, section 3553(f) (relating to the "safety valve") provides for a sentence "without regard" to any statutorily required minimum sentence. In dissent, Senior Judge Butzner noted that §5K1.1 permits departure "from the guidelines" and that the low end of "the guidelines" was 188 months.

United States v. Wallace, 22 F.3d 84 (4th Cir.), *cert. denied*, 513 U.S. 910 (1994). The circuit court did not err in refusing defendant's request to depart downward under USSG §5K1.1 based on the defendant's "substantial assistance" in order to enforce his plea agreement with the government. A court may not grant such a departure without a government motion unless 1) the government obligated itself in the plea agreement or 2) the refusal to make the motion was based on an unconstitutional motive. The plea agreement provided the government with the discretion to make such a motion if it determined it was warranted, but did not impose a binding obligation to do so. Nor was the refusal to move for departure based on unconstitutional racial bias. The only support for this claim offered by the defendant was the allegation that the same United States Attorney's office recently moved for downward departure on behalf of several middle class white defendants convicted of comparable drug offenses. The circuit court held that this alone was not sufficient to reach judicial inquiry under United States v. Wade, 112 S. Ct. 1840 (1992) (defendant must make a "substantial threshold showing" of unconstitutional motive).

§5K2.0 Grounds for Departure (Policy Statement)

See United States v. Achiekwelu, 112 F.3d 747 (4th Cir.), *cert. denied*, 522 U.S. 901 (1997), §2F1.1, p. 9.

United States v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896 (1997). The district court properly departed upward from the standard guideline sentence for kidnapping. The district court found four aggravating factors which it used to justify the upward departures and the defendant's increased sentence including §§5K2.2 (physical injury), 5K2.8 (extreme conduct), 5K2.5 (property damage), and 5K2.4 (abduction or unlawful restraint). The defendant argued that the extent of the departures made by the district court were unreasonable because certain facts the district court relied upon were erroneous. The defendant objected to the consideration of §5K2.2 as a ground for departure because §2A4.1(b)(2) of the guidelines under kidnapping provides for a four-level increase if the victim sustained permanent or life-threatening bodily injury. The Fourth Circuit, applying the standard of review established by the Supreme Court in Koon v. United States, 116 S. Ct. 2035 (1996), rejected this argument and held that the extent of the upward departure should ordinarily depend on the extent of the injury, the degree to which it may prove to be permanent, and the extent to which the injury was intended. When the victim suffers a major permanent disability, and when such an injury was intentionally inflicted, a substantial departure may be appropriate. Similarly, the defendant objected to the use of USSG §5K2.4 because the crimes of kidnapping and domestic violence contain the elements of abduction and unlawful restraint and thus, an additional departure would not be authorized. The circuit court held that because of the egregious nature of the restraint in this case, being held captive in the trunk of a car for an extended period of time, a departure based on USSG §§5K2.2 and 5K2.5 was completely reasonable. Additionally, the defendant argued that a departure under USSG §5K2.5 was erroneous because the four-level adjustment for a permanent or life-threatening bodily injury mentioned in USSG §2A4.1(b)(2) obviated the use of USSG §5K2.5 because in every case involving serious injury, there will always be significant medical expenses. The district court rejected this argument and held that the district court correctly referred to USSG §5K2.5 due to the massive future medical expenses involved. Lastly, the defendant argued that the use of USSG §5K2.8 was unwarranted because the facts underlying the finding of extreme conduct were erroneous. The Circuit Court rejected this argument, holding that even in the light most favorable to the defendant, the defendant's conduct was intentionally brutish, cruel, and extreme.

United States v. Fenner, 147 F.3d 360 (4th Cir.), *cert. denied*, 525 U.S. 1030 (1998). The district court properly concluded it could not base a downward departure on the increase in sentencing range that resulted from application of a cross-reference. The defendants had been charged with and acquitted of the murder of a co-conspirator in a drug distribution conspiracy. They were later convicted on federal drug and firearms charges. At sentencing, the district court found that they were responsible for the murder and applied the cross-reference to the homicide guidelines contained in §2K2.1(c)(1)(B). The district court ruled that although application of the cross-reference resulted in rather large enhancements of the guideline ranges, it lacked authority to depart downward. The defendants argued that under Koon v. United States, 518 U.S. 81 (1996), enhancement of a sentencing range through application of a cross-reference is not a prohibited basis for departure, therefore the district court possesses the authority to depart on that basis. The court of appeals viewed the enhancement resulting from application of a cross-reference as an unmentioned departure factor, and went on to determine whether the enhancement is taken into account within the heartland of the applicable guidelines. The language of the cross-reference plainly indicates that when a firearm is illegally possessed in connection with another offense from which death results, the sentencing court must enhance the defendant's sentence in accordance with the homicide guidelines if that sentence is greater than that calculated without reference to the homicide guidelines. Thus the guidelines take into account that the application of the cross-reference will result in an enhanced guideline range.

United States v. Hairston, 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 519 U.S. 1114 (1997). The district court abused its discretion in granting a downward departure based on the defendant's "extraordinary restitution." The defendant, through the generosity of friends, repaid the bank she had embezzled \$250,000 to settle her civil liability. The district court determined that her efforts merited a five-level departure for "extraordinary restitution." The government appealed, arguing that the defendant's restitution was not "extraordinary." The circuit court stated that the standard of review for departure cases is now a "unitary abuse of discretion standard." Koon v. United States, 116 S. Ct. 2035 (1996). The circuit court concluded that because the guidelines already take restitution into consideration in the context of a sentence reduction for acceptance of responsibility, restitution is a discouraged factor that can support a departure only if the restitution in a particular case demonstrates an extraordinary acceptance of responsibility. See United States v. Hendrickson, 22 F.3d 170 (7th Cir.), *cert. denied*, 115 S. Ct. 209 (1994). Here, the court found that the defendant's restitution was not extraordinary as it equaled less than half the amount she embezzled and came not from her funds, but from the generosity of friends. Therefore, when compared to the efforts of defendant's in other cases, the district court abused its discretion in finding that the circumstances merited departure.

United States v. Matthews, 209 F.3d 338 (4th Cir. 2000). Defendant pleaded guilty to one count of receiving child pornography and one count of transmitting child pornography. Defendant argued the district court clearly erred in the factual findings that formed the basis for its refusal to grant a downward departure from the applicable sentencing range given the defendant's contention that his trafficking in child pornography solely was for a journalistic purpose. Moreover, defendant contended that the Supreme Court's decision in Koon v. United States, 518 U.S. 81 (1996) overruled Fourth Circuit precedent that held as unreviewable district court refusals to downwardly depart. The appellate court noted that prior to Koon, the Fourth Circuit had joined seven other circuits in ruling that the factual findings underlying a district court's refusal to depart downward could be reviewed only when the district court was under the mistaken impression that it lacked the authority to depart. As Koon addressed the issue of the appropriate standard of review to be applied to a district court's decision to depart, and not the review of a district court's decision not to depart, Koon did not overrule circuit precedent.

United States v. Myers, 66 F.3d 1364 (4th Cir. 1995). The defendants pleaded guilty to carjacking and use of a firearm. They repeatedly beat and raped their victim. The district court departed upward based on the "extensive psychological effect" of the crime on the victim, USSG §5K2.3, the extreme conduct in inflicting gratuitous pain, USSG §5K2.8, and the physical injury to the victim, USSG §5K2.2. The appellate court agreed with the defendants that the district court erred in departing for physical injury because it was taken into account under USSG §2B3.1(b)(3)(C) in determining the guideline range, and the district court made no finding that that adjustment was not sufficient. However, the appellate court was convinced that the district court's reliance on this ground did not affect the sentence imposed. The "reliance on physical harm as a factor in the upward departure decision was harmless."

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). The district court erred in granting a downward departure to the defendant. At sentencing, the defendant was granted a downward departure, from the applicable guidelines range of 292 months to 240 months, based on three justifications: comparatively lenient treatment of similarly culpable co-defendants; unwarranted racial disparity in sentencing stemming from the fact that most of the co-defendants are white and the defendant is black; and a shorter sentence more accurately reflects the defendant's relative culpability. The Government appealed the departure. Disparate sentences among co-defendants is not a permissible ground for departure. *See United States v. Withers*, 100 F.3d 1142, 1149 n.3 (noting unanimous agreement that such departures are impermissible among circuits which have addressed the issue). With respect to the racial disparity claim, the circuit court stated that race can never be a basis for a departure. United States v. Rybicki, 96 F.3d 754, 757 (4th Cir. 1996); USSG §5H1.10. As for a departure based on "relative culpability," the circuit court dismissed this argument stating that such departures would circumvent the district court's factual determinations. The sentence was vacated and the case was remanded to the district court for resentencing within the applicable guideline range.

United States v. Pitts, 176 F.3d 239 (4th Cir.), *cert. denied*, 120 S. Ct. 259 (1999). The district court did not err in departing upward one level based upon the district court's finding that the defendant's abuse of trust was extraordinary. The defendant was an FBI agent who sold confidential information to Russia. The district court applied the two-level abuse of trust enhancement pursuant to §3B1.3, and then departed upward one level for extraordinary abuse of trust. The defendant appealed the upward departure, arguing that because he was no more culpable than other counterintelligence or supervisory agents who hold similar positions and who may also commit crimes, a departure was unwarranted. The appellate court stated that an upward departure based upon an extraordinary abuse of trust is warranted if the combination of the level of trust violated by the defendant and the level of harm created solely by the violation of that trust falls outside the heartland of cases that qualify for the enhancement. Here, the level of trust placed in the defendant was unmatched. He was a supervisory special agent of the FBI and a foreign counterintelligence operative whose job was to thwart the espionage activities of the very foreign intelligence service with whom he conspired. In violating, that "awesome responsibility and trust," the defendant violated a level of trust to which most men are never exposed. The defendant presented several other espionage cases where more harm followed in which the sentencing court did not depart based upon abuse of trust. The appellate court rejected this reasoning, concluding that the harm resulting from the actual offense is irrelevant to a decision to depart based upon an extraordinary abuse of trust. The relevant harm is the harm created by the violation of trust.

United States v. Rybicki, 96 F.3d 754 (4th Cir. 1996). The Fourth Circuit, using a five-part test, found that none of the six factors underlying the district court's decision justified a departure and, thus, concluded that the district court abused its discretion in granting a five-level departure. The district court had departed downward based on a combination of factors, and the government appealed the departure. The circuit court prescribed the following analysis for sentencing courts to follow when deciding whether to depart, and clarified the standards for review of departure decisions: 1) The district court must first determine the circumstances and consequences of the offense of conviction. This is a factual inquiry which is reviewed for clear error. 2) The district court must decide if the circumstances appear "atypical" and potentially take the case out of the heartland. This is purely analytical and never subject to appellate review. 3) The district court must classify each factor as "forbidden, encouraged, discouraged, or unmentioned." This is a matter of guideline interpretation and reviewed de novo in the context of the ultimate review for abuse of discretion. 4) Factors that are "encouraged, discouraged, or unmentioned" require further analysis. Encouraged factors, if not taken into account by the guidelines, are usually appropriate bases for departure. Discouraged factors are an appropriate basis for departure only in exceptional cases. Unmentioned factors may justify a departure if the factor takes the case outside the guideline's heartland. 5) The district court must consider whether the circumstances and consequences appropriately classified and considered take the case out of the applicable guideline's heartland and whether a departure is warranted. The circuit court, relying on this analysis, held that none of the factors underlying the district court's decision justified a departure and concluded that the court abused its discretion in granting a five-level departure. The court held: 1) defendant's alcohol problem was a forbidden basis for downward departure; 2) defendant's 20 years of unblemished service to the United States, nor responsibilities to his wife and son, who had medical problems, provided bases for a departure downward; 3) district court committed legal error when it departed downward on the ground that the defendant did not commit serious fraud; 4) determination that all law officers suffer disproportionate problems when incarcerated was not proper basis for departure; and 5) finding that the defendant's status as a convicted felon was sufficient punishment was not proper basis for downward departure.

United States v. Weinberger, 91 F.3d 642 (4th Cir. 1996). The district court erred in departing downward based on the defendant's exposure to civil forfeiture. The defendant was convicted of submitting fraudulent claims to Medicaid and Medicare. Under the plea agreement, the defendant was to pay restitution of \$545,000. However, in a consent judgment in a civil forfeiture action, the defendant agreed to forfeit over \$600,000 which was credited against the restitution in the plea agreement. The district court departed downward under USSG §5K2.0 because the defendant had paid a sum "beyond" complete restitution. The circuit court reversed, holding that exposure to civil forfeiture is not a basis for a downward departure. The court noted that forfeiture was considered by the Sentencing Commission and was intended to be in addition to, and not in lieu, of imprisonment. Additionally, civil forfeiture actions do not suggest any reduced culpability or contrition on the part of a defendant that might warrant a sentence reduction. The circuit court concluded that the district court's departure was an error of law and therefore, an abuse of discretion.

§5K2.1 Death (Policy Statement)

United States v. Perkins, 108 F.3d 512 (4th Cir. 1997). On appeal by the government, the appellate court vacated the defendant's sentence after a finding that the lower court erred in granting the defendant a departure based on impermissible factors. The defendant argued that his departures were warranted because of the cocaine and crack sentencing disparity in the United States sentencing guidelines and the fact that his white codefendants received lower sentences. The appellate court

disagreed, and held that a district court cannot depart from an applicable guideline range based on its own sense of justice. Applying the abuse of discretion standard set forth in Koon v. United States, 116 S. Ct. 2035 (1996), the appellate court held that under the law of the Fourth Circuit, disparate sentences among codefendants was not a viable ground for departure. Similarly, racial disparity in sentencing and relative culpability were simply different ways of justifying the district court's desire to equate the defendant's sentence with those of his codefendants. It was determined by the lower court that the defendant was actually the leader of the drug selling enterprise. Ultimately, these factors contributed to the defendant's total offense level and aided in the judge's determination of the applicable guideline range. The appellate court further noted that departures based on relative culpability would allow district courts to ignore their own factual determinations.

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The district court abused its discretion by departing upward four levels in determining the defendant's sentence for two counts of reckless involuntary manslaughter and an additional uncharged death. The circuit court held that the additional uncharged death of a participant in the aggressive driving could provide a basis for upward departure, even though that victim had been "an active participant in the activity that resulted in his death." However, the sentencing court erred by failing to make additional findings of fact to support the extent of the departure. The court noted that the defendant would have received a one-level increase for the third death under the sentencing guidelines' grouping rules. *See* USSG §3D1.4. The guidelines provide that the extent of an upward departure for death "should depend on the dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury." The circuit court noted that the sentencing court failed to make findings as to the defendant's state of mind. "Accordingly, the extent of the district court's departure turns on whether the recklessness exhibited by Terry was adequate to establish the existence of malice. Because the district court made no such findings, we remand."

United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998). The district court did not err in departing upward based on the murder of the victim in a kidnaping case. The court of appeals held that, unless §2A4.1 of the 1990 guidelines takes into account the death of the kidnaping victim as occurred in the instant case, the court could upwardly depart based on §5K2.1. The guideline specifically provides for other circumstances such as holding the victim for ransom or with a deadly weapon or for a prolonged period. It also provides an adjustment if the kidnaping was done to facilitate the commission of another offense. In this case, however, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her. The guideline does not take into account this scenario. Therefore, an upward departure to life imprisonment based on the victim's death was not an abuse of discretion.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The defendant was convicted of two counts of involuntary manslaughter for the deaths of two commuters who died when he lost control of his car while he was engaging in aggressive driving. The circuit court held that the sentencing court abused its discretion in departing upward three levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is "not limited to the direct victim of the offense of conviction" but can also apply to indirect victims, an indirect victim is a victim "because of his relationship to the offense, not because of his relationship to the direct victim." As an example, the court noted that bank tellers and bank customers

may be indirect victims of a bank robbery. Here, the court held that there was no “evidence that the families in question had any relationship to the offense beyond their relationship to the direct victims.” The family members were not victims of the offense of conviction.

§5K2.14 Public Welfare (Policy Statement)

United States v. Terry, 142 F.3d 702 (4th Cir. 1998). The circuit court remanded the case to allow the sentencing court to determine whether the danger created by the defendant’s reckless conduct while driving was outside the “heartland” of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. *See* USSG §2A1.4(a)(2). On remand, the sentencing court must determine whether the defendant’s reckless driving was “present to an exceptional degree” or was in some other way different from the ordinary case where the factor is present. *Citing Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 2045 (1996). If, on remand, the sentencing court determines that an upward departure is warranted, the court must determine a reasonable departure. In determining the extent of departure, the court may be aided by looking “to the treatment of analogous conduct in other sections of the sentencing guidelines.” In the absence of useful analogies, the court must “set forth some form of principled justification for its departure determination.”

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 3583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was “too harsh in the circumstances and that it limited the court’s sentencing discretion too much.” The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant’s case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that “once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under section 3583 `necessarily follows.’” United States v. Courtney, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Lominac, 144 F.3d 308 (4th Cir. 1998). The district court erred in reimposing supervised release following revocation of supervised release where the defendant’s original offenses, Class C and Class D felonies, occurred prior to the enactment of 28 U.S.C. § 3583(h). The court of appeals held that there was an *ex post facto* violation for those defendants who committed a Class B, C, or D felony prior to the enactment of § 3583(h). Under the old law, the greatest sentence of imprisonment the defendant could receive was 24 months; under the new law, he could be sentenced to imprisonment of up to 24 months, plus supervised release of up to an additional 12 months, for a

total possible punishment of 36 months. Thus, the enactment of §3583(h) had the effect of increasing the penalty for this defendant and for others similarly situated. The court implied that there was no increase in punishment, and therefore no *ex post facto* violation, for defendants who had committed a Class A or E felony, but did not explicitly rule on this issue.

United States v. Pierce, 75 F.3d 173 (4th Cir. 1996). The district court did not err in sentencing the defendant to a term of supervised release even though the punishment both exceeded the maximum term of imprisonment authorized by the assimilated state statute and was not authorized by the assimilated state statute. On appeal the court noted that the Assimilated Crime Act ("ACA") provides that a person who commits a state crime on a federal enclave shall be subject to a "like punishment." However, the court determined, federal courts are not completely bound by state sentencing requirements. "Like punishment" requires only that the punishment be similar, not identical. The court noted that although the state statute does not authorize supervised release, it authorized parole. According to the court, both occur following a term of imprisonment, involve government supervision, and serve to facilitate a prisoner's transition into society. Consequently, supervised release was similar enough to parole that a term of supervised release did not violate the ACA's requirement that the defendant be subject to "like punishment." *Cf. United States v. Reyes*, 48 F.3d 435, 437-39 (9th Cir. 1995). The court further noted that, although the total sentence did exceed the maximum term of imprisonment authorized by the state statute, under the federal system, supervised release is not considered to be a part of the incarceration portion of a sentence. To remain faithful to the federal sentencing policy regarding the imposition of supervised release, the court refused to sanction an exception for ACA defendants. Therefore, supervised release under the ACA may exceed the maximum term of incarceration provided for by state law.

United States v. Woodrup, 86 F.3d 359 (4th Cir.), *cert. denied*, 519 U.S. 944 (1996). The district court did not err in imposing a 24-month sentence for the revocation of defendant's supervised release and then imposing a consecutive 240-month sentence for the bank robbery upon which the revocation was based. The defendant argued that the imposition of both sentences violated the Double Jeopardy Clause. In rejecting the defendant's argument, the appellate court noted that when a defendant violates the terms of his supervised release, the sentence imposed is an authorized part of the original sentence. The court noted that this conclusion is supported by the fact that the full range of protections given to a criminal defendant is not required for the revocation of supervised release. The imposition of a sentence upon revocation of supervised release is not a punishment for the conduct prompting the revocation, but a modification of the original sentence for which supervised release was authorized. Analogously, courts have consistently held that subsequent punishment for conduct that gave rise to the revocation of probation does not violate double jeopardy. United States v. Hanahan, 798 F.2d 187, 189 (7th Cir. 1986). The Fourth Circuit joined the Ninth Circuit, the only other circuit court to consider this issue, in holding that the sentencing of a defendant for criminal behavior that previously served as the basis for revocation of supervised release does not violate the Double Jeopardy Clause. *See United States v. Soto-Olivas*, 44 F.3d 788, 792 (9th Cir.), *cert. denied*, 115 S. Ct. 2289 (1995).

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Clark, 30 F.3d 23 (4th Cir.), *cert. denied*, 513 U.S. 1027 (1994). The district court erred in refusing to apply the provisions of 18 U.S.C. § 3583(g), which in this case would have required the defendant to receive a sentence of at least one year in prison. The government presented

positive evidence that defendant had used a controlled substance during his term of supervised release. Instead of sentencing the defendant to one year in prison pursuant to 18 U.S.C. § 583(g), the district court sentenced the defendant to nine months and eight days in prison pursuant to USSG §7B1.4. To support the sentence, the district court reasoned that 18 U.S.C. § 3583(g) was "too harsh in the circumstances and that it limited the court's sentencing discretion too much." The government appealed, asserting that 18 U.S.C. § 3583(g), not USSG §7B1.4, was applicable to the defendant's case. Agreeing with the government, the Fourth Circuit held that the application 18 U.S.C. § 3583(g) was indeed required. The Fourth Circuit stated that "once a district court credits laboratory analysis as establishing the presence of a controlled substance, possession under § 3583 `necessarily follows.'" United States v. Courtney, 979 F.2d 45, 49 (5th Cir. 1992).

United States v. Davis, 53 F.3d 638 (4th Cir. 1995). In deciding an issue of first impression, the Fourth Circuit held that the Chapter Seven policy statements regarding the revocation of supervised release are advisory in nature and are not binding on the courts. The Fourth Circuit had previously held in United States v. Denard, 24 F.3d 599 (4th Cir. 1994), that the Chapter Seven policy statements are not binding in the context of a probation revocation, and applied that reasoning here, finding no basis for a distinction between a revocation of probation and a revocation of supervised release in determining the mandatory or advisory nature of Chapter Seven policy statements.

United States v. Denard, 24 F.3d 599 (4th Cir. 1994). 18 U.S.C.A. § 3565(a) provides that when a probationer is found in possession of a controlled substance, "the court shall revoke the sentence of probation and sentence the defendant to no less than one-third of the original sentence." The "original sentence" is the defendant's original guideline imprisonment range. Therefore, the sentence must be at a minimum one-third of the maximum sentence in his original guideline range and at a maximum the guideline's maximum. This decision is consistent with United States v. Granderson, 511 U.S. 39 (1994). Although this rule may provide a sentence that is inconsistent with the probation revocation tables in guideline §7B1.4, the policy statements contained in Chapter Seven are intended to provide guidance and are not binding on the courts.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C2.5 Culpability Score

United States v. Brothers Construction Company of Ohio, Incorporated, 219 F.3d 300 (4th Cir. July 6, 2000). Defendant corporations were convicted of conspiracy to defraud the United States, two counts of wire fraud, and one count of making a false statement. Defendant Tri-State Asphalt Corporation received a \$500,000 fine; defendant Brothers Construction Company received no fine due to insolvency. Tri-State appealed, *inter alia*, the district court's imposition of a three-level sentencing enhancement for obstruction of justice. *See* USSG §8C2.5(e). The district court found, in imposing the enhancement, that an agent of Tri-State had made a false statement in a letter to investigators, and given perjurious grand jury testimony, regarding the organization's compliance with a state program fostering the development of disadvantaged business enterprises. Tri-State argued that the enhancement constituted double counting insofar as the letter constituted the act for which Tri-State was convicted

of conspiracy to defraud and making a false statement. The appellate court held, however, that because the district court identified another separate, independent basis for applying the obstruction of justice enhancement, namely, the grand jury testimony, the enhancement was not erroneous. Further, the district court's finding that the grand jury testimony was false as to a material fact and was willfully given to obstruct justice was not clearly erroneous.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Goins, 51 F.3d 400 (4th Cir. 1995). The trial court erred in failing to inform the defendant during the Rule 11 hearing that a guilty plea would result in a mandatory minimum sentence. The defendant had not been aware of the mandatory minimum sentence until the presentence report was prepared, nearly three months after the plea had been accepted. The government argued that the error was harmless, but the circuit court held that a violation cannot be considered harmless if the defendant had no knowledge of the mandatory minimum at the time of the plea. In considering this issue of first impression, the Fourth Circuit joined the Fifth and Eleventh Circuits in concluding that a district court's failure to inform the defendant of the mandatory minimum is reversible error. *See* United States v. Watch, 7 F.3d 422 (5th Cir. 1993); United States v. Hourihan, 936 F.2d 508 (11th Cir. 1991).

United States v. Good, 25 F.3d 218 (4th Cir. 1994). The district court's failure to explain to the defendant the significance of supervised release amounted to harmless error. Although he was advised of the possible minimum and maximum penalties, the defendant claimed that he was unaware when he pleaded guilty that his punishment could include additional incarceration if he violated the terms of his supervised release. He argued that since 21 U.S.C. § 841(b)(1)(B) only provides for a minimum period of supervised release, the judge could extend his supervised release term to life and thereby expose him to the possibility of prison for life. The circuit court concluded that the maximum supervised release time for a first offender guilty of a class B felony is five years. The court pointed out that this conclusion is consistent with USSG §5D1.2 which provides for a term that is at least three years but not more than five years or the minimum period required by statute, whichever is greater, for a defendant convicted under a statute that requires a period of supervised release. Since the defendant pleaded guilty to an offense which requires a supervised release term of at least four years, he faced a maximum term of five years, not life. The lower court's failure to warn him of this conclusion was harmless error because "the combined sentence of incarceration and supervised release actually received by the defendant is less than the maximum term he was told he could receive." United States v. Moore, 592 F.2d 753, 756 (4th Cir. 1979). The circuit court noted that the Ninth Circuit accepts the interpretation suggested by the defendant, but it explicitly declined to follow that view. *See* Rodriguera v. United States, 954 F.2d 1465 (9th Cir. 1992); United States v. Sanclemente-Bejarano, 861 F.2d 206 (9th Cir. 1988) ("pursuant to 18 U.S.C. § 3593(e)(2), a supervised release term may also be extended, potentially to a life term, at any time before it expires." *Id.* at 209).

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998). The district court's failure to inform defendant at his Rule 11 hearing that his sentence would include a term of supervised release and to describe to him the nature of supervised release before accepting his guilty plea was error. The court

of appeals held that the court's oversight was not harmless error as outlined in United States v. Good, 25 F.3d 218 (4th Cir. 1994). The maximum term Thorne understood he could receive (235 months) was less than his actual sentence of 248 months (188 months in prison plus 60 months of supervised release). In the even he violated release, he would be subject to a further five years of incarceration, resulting in an even greater disparity. The court of appeals ordered that Thorne be permitted to withdraw his plea and plead anew.

Rule 32

United States v. Cole, 27 F.3d 996 (4th Cir. 1994). The district court committed plain error in denying the defendant his right of allocution, in violation of Fed. R. Crim. P. 32(a)(1)(C). The district court conducted a colloquy only after it pronounced the defendant's sentence. Further, it appeared from the record that the sentencing judge discouraged the defendant from addressing the court. Although the defendant did not object below, the circuit court found that the district court committed plain error which was prejudicial, in that the defendant may have persuaded the sentencing judge that he was responsible for a lesser quantity of drugs, that he had accepted responsibility, and merited a lower sentence.

United States v. McManus, 23 F.3d 878 (4th Cir. 1994), *cert. denied*, 517 U.S. 1215 (1996). The district court did not violate the provisions of Rule 32(a)(1)(A), which requires the sentencing court to determine that the defendant had the opportunity to read and discuss the PSR with his counsel before sentencing, by failing to pose certain questions to the defendant regarding his PSR. The Fourth Circuit declined to adopt the Seventh Circuit's approach in United States v. Rone, 743 F.2d 1169 (7th Cir. 1984), requiring the district court to ask specific questions about whether the defendant had read and discussed the PSR with counsel and whether the defendant wished to challenge any facts in the report. Rather, the Fourth Circuit held that there is no particular methodology for compliance with Rule 32(a)(1)(A). The defendant's markings such as "I surrender" on the PSR, his objections to the findings in the PSR, and his statements at sentencing about the trial evidence all indicated that the requirements of Rule 32 had been met.

See United States v. Walker, 29 F.3d 908 (4th Cir. 1994), §1B1.3, p. 3.

Rule 35

United States v. Martin, 25 F.3d 211 (4th Cir. 1994). The district court denied the government's motion to reduce the defendant's sentence pursuant to Fed. R. Crim. P. 35(b) based upon his extensive cooperation with the government prior to the original sentencing. The government indicated at the defendant's initial sentencing that a substantial assistance motion would be filed at a later date pursuant to office policy. Almost 12 months after the defendant's initial sentencing, the government filed its Fed. R. Crim. P. 35(b) motion. The district court denied the motion on the basis that it lacked authority to grant the departure. The circuit court held that the government was required to make a §5K1.1 substantial assistance motion at the time of sentencing for substantial assistance rendered prior to sentencing. A delay in making a substantial assistance motion, on the grounds that a Fed. R. Crim. P. 35(b) motion will be made at a later date, denies a defendant due process. However, the circuit court held that the defendant's plea agreement was effectively modified by the government's

accession to make a substantial assistance motion based upon the defendant's presentence assistance, and the defendant was entitled to specific performance of this promise on remand.

OTHER STATUTORY CONSIDERATIONS

United States v. Cobb, 144 F.3d 319 (4th Cir. 1998). The district court did not err in refusing to dismiss the carjacking count against the defendant. The court of appeals rejected the defendant's argument that the federal carjacking statute, 18 U.S.C. § 2119, exceeds Congress' authority under the Commerce Clause and is therefore unconstitutional. The Fourth Circuit joined other circuits which have considered the issue in holding that the carjacking statute lies within the bounds of Congress' commerce power.

United States v. Dawkins, 202 F.3d 711 (4th Cir. 2000). Defendant, a former postal employee, was convicted of making false statements to obtain federal employee's compensation. As the district court erred in calculating the amount of loss for sentencing purposes, it necessarily would also have to reconsider the matter of restitution on remand inasmuch as the amount of restitution depends on the amount of loss. *See* Mandatory Victim Restitution Act of 1996, 18 U.S.C. §§ 3663A(a)(1), (c)(1)(A)(ii), 3664(f)(1)(A). The appellate court noted that the district court fulfilled its obligation under the Act to specify the manner and schedule by which the defendant was to pay restitution by providing for an alternative repayment schedule should the defendant be unable to pay the total amount of restitution due immediately. However, the district court failed to make all the necessary factual findings for determining how the restitution was to be paid, as required by the Act. Specifically, the district court failed to make any factual findings keying the defendant's financial situation to the restitution schedule ordered, and failed to find that the restitution order was feasible. The appellate court ordered the district court to make such findings on remand.

United States v. Ubakanma, 215 F.3d 421 (4th Cir. June 12, 2000). Defendants pleaded guilty to wire fraud. One of the defendant's appealed his restitution order. The appellate court reviewed the restitution order for plain error as the issue was not preserved at the sentencing hearing. Pursuant to the Victim and Witness Protection Act of 1982, 18 U.S.C. §3663, a court may order restitution only to victims of an offense for losses traceable to the offense of conviction. The court must also consider various other factors, including the amount of loss sustained by the victim. As the court failed to make a finding as to the actual losses suffered by the victims of the offense, a remand for resentencing was required.